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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,
PETITIONERS,

vs.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION

No. 336

ROBERT W. HIGGINS ET AL., PETITIONERS,

vs.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED AUGUST 5, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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(Note: The record of the trial of a case as prepared in and transmitted from the trial court to the Supreme Court of the State of Oklahoma on appeal is termed a "Case-Made" and is referred to in the briefs and proceedings in the Supreme Court by the abbreviation "C-M." In the following printed transcript the reference C-M is to the original typewritten record of the trial and proceedings in the trial court as filed in the Supreme Court of the State of Oklahoma. Also in the statement of the evidence in said printed transcript the above case will be referred to as the Noble case and its companion case, with which it was consolidated in the Supreme Court of Oklahoma and is consolidated in the Supreme Court of the United States, as the Higgins case.)

[fol. 8] STATE OF OKLAHOMA,
Oklahoma County, ss:

IN THE DISTRICT COURT IN AND FOR THE SAID COUNTY AND STATE

No. 66,726

GEORGE NOBLE and WILLIAM NOBLE, Plaintiffs,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendant

PETITION—Filed Jan. 6, 1931

Come now the plaintiffs above named and for their cause of action against the defendant above named allege and say:

1. That the defendant is now, and was at all times herein mentioned, a municipal corporation and city of the first class, created, organized and existing as such under the laws of the former territory, and now state, of Oklahoma, and possessing all the political, governmental, legislative and corporate powers granted and delegated a city of the first class under the laws of said territory and state.

2. That the plaintiffs are the owners in fee simple of the full title, both legal and equitable, and are entitled to the immediate possession of the following described real estate situated in Oklahoma County, in the State of Oklahoma, [fol. 9] and within the present corporate limits of said City of Oklahoma City, to-wit:

Forty (40) feet off the north end of Lot No. (6) Six, in Block No. Thirty-six (36), in the original townsite of said City of Oklahoma City, according to the recorded plat thereof, and a strip of land ten (10) feet wide across and adjoining the north end of said Lot Six (6), being one-half (½) of the alley twenty (20) feet wide extending east and west through said block as laid out and designated on said plat, where and as the said alley adjoins the north end of said Lot Six (6);

and that the defendant wrongfully detains the possession thereof from them.

3. That the plaintiffs deraign their title to the said real estate as follows:

By patent from the United States of America to Edgar N. Sweet, Levy E. Coe and David H. Hammons, as trustees of the townsite of said Oklahoma City, in trust for the several use and benefit of the occupants of said townsite according to their respective interests, a full, true and correct copy of which is hereto attached, marked Exhibit A, and made a part hereof.

By deed from said townsite trustees to Naoma Noble, conveying said lot No. Six (6), in Block No. Thirty-six (36), a full, true and correct copy of which is hereto attached, marked Exhibit B, and made a part hereof.

[fol. 10] By inheritance from Naoma Noble, who died in Oklahoma County, in the State of Oklahoma, prior to the year 1920, leaving surviving her the plaintiff George Noble, her husband, and the plaintiff William Noble, her son, as her sole and only heirs.

4. That on the 28th day of March, 1891, the said Naoma Noble and George Noble, her husband, made, executed and delivered to the Choctaw Coal and Railway Company, a railway corporation, their deed conveying said forty (40) feet off the north end of said Lot No. Six (6), for use and occupation by said grantee and its successors and assigns

of said tract of land conveyed by said deed for a right of way for the constructing, operation and maintenance of a railway, but with the condition subsequent stated in said deed that in case of the abandonment of the real estate conveyed therein for the purposes mentioned, the same should revert to the grantor, their heirs, or assigns, a full, true and correct copy of which deed is hereto attached, marked Exhibit C, and made a part hereof; that in April, 1891, the said City of Oklahoma City, by ordinance duly passed, adopted and enacted, vacated the alley twenty (20) feet wide extending east and west through said block No. thirty-six (36) as laid out and designated on the plat of the original townsite of said City of Oklahoma City, as a public way and granted the said Choctaw Coal and Railway Company a permit, franchise or right to use the same for railroad right of way and railroad purposes; that the real estate described in said deed and that included in said alley [fol. 11] was taken, used and occupied by said Choctaw Coal and Railway Company and by the Choctaw, Oklahoma and Gulf Railroad Company, a corporation, as its successor and assign, and by the Chicago, Rock Island and Pacific Railway Company, a corporation, as lessee of said Choctaw, Oklahoma and Gulf Railroad Company, from about the time of the execution of said deed to the 4th day of December, 1930; that on or about the 17th day of November, 1927, the said Choctaw Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island and Pacific Railway Company entered into a contract whereby they agreed for a valuable consideration to convey to the defendant by a quit claim deed, all their right, title and interest in and to the real estate above described and other real estate and to discontinue the use and occupation of, vacate and abandon the same for right of way and railroad business and purposes; that, thereafter, said railroad companies made application to the Interstate Commerce Commission of the United States for a certificate of Public Convenience and Necessity granting them permission to abandon a portion of their line of railroad through the said City of Oklahoma City, described in their said application and including all the real estate above described, and such proceedings were had on said application that thereafter, and on the 9th day of April, 1928, the Certificate of Public Convenience and Necessity as applied for was by said Interstate Commerce Commission granted, a full, true and correct copy of which

is hereto attached, marked Exhibit D, and made a part [fol. 12] hereof; that on or about the 4th day of December, 1928, the said companies for a valuable consideration executed and delivered to the defendant an instrument of conveyance termed a quit claim deed, by which they conveyed all of their right, title and interest in and to all the real estate above described, together with other lands; that thereafter, and on the 4th day of December, 1930, the said railroad companies abandoned the use of said land for right of way and railroad purposes and ceased to use and occupy the same for any railroad purpose or for any purpose whatever, and took up and removed all railroad tracks therefrom, and delivered possession thereof to the defendant, and thereupon, the defendant entered into possession of said real estate, and ever since has retained, and still does retain, the possession thereof to the exclusion of the plaintiffs therefrom; and that the said defendant in purchasing said real estate from said railroad companies and in obtaining their quit-claim deed therefor, and in entering into possession thereof, did not intend, and does not now intend, to use the same for a railroad right of way, or for any railroad purpose whatever, and has not used, and is not using, and can not lawfully use, the same for any such purpose, but intends to enclose, appropriate, convert and apply the same so as to make it a part of a public park of said city, and for public use as such park, and now holds possession thereof for said purpose.

5. That by the terms and provisions of said deed, Exhibit C, when the said railroad companies discontinued the use [fol. 13] and occupation of the real estate therein described as and for a right of way for the operation and maintenance of their railroad and business thereon, and abandoned the same for such purpose, their title thereto was defeated and terminated and the title to said real estate reverted to the plaintiffs, who became entitled immediately to re-enter and take possession thereof for breach of the condition in said deeds and thereby became invested with the full fee simple title thereto and the possession thereof, free and discharged from all and whatever right and title the said railroad companies, or any of them, may at any time have had to the same, or to the use and occupation thereof for right of way and railroad purposes, or for any purpose; that the said quit claim deed purporting to convey whatever title the

said railroad companies had in the said real estate to the defendant is conclusive evidence of the abandonment of the real estate therein described for railroad purposes, but is ineffective in law to convey any right, title or interest therein, for that the said railroad companies had no right, title or interets therein which they could convey to the defendant, and the defendant did not, and could not, acquire any title, right, claim or interest in and to said real estate under and by virtue of said quit claim deed; that when the use and occupation of said alley for right of way and railroad purposes was abandoned by the said railroad companies, after having been vacated as a public way by the defendant as above set forth, then the same reverted to the [fol. 14] owners of real estate thereto adjacent in proportion to the frontage of such real estate, and the portion thereof measured by said lot extended to the middle of said alley reverted to the plaintiffs; and that the said deed from said railroad companies to the defendant constitutes a cloud on the title of the plaintiffs in and to said real estate which they are entitled to have cancelled and removed and to have the title thereto quieted in them against all claims of the defendant.

Wherefore, the plaintiffs pray that they have and recover of and from the defendant a judgment for the possession of the said real estate first described herein and the ejectment of the defendant therefrom, and a further judgment quieting title thereto in them against the defendant and cancelling and removing the said quit claim deed from said railroad companies to the defendant as a cloud on their title thereto, and a further judgment adjudging them to be the owners of the said real estate in fee simple absolute, and free and clear of any and all claims of the defendant whatsoever, and perpetually enjoining and restraining the defendant from ever asserting any claim of right or title thereto, or interest therein, and that they have all such further or other and different relief in the premises as shall be lawful, equitable and just.

Henry L. Goddard, Fred Ptak, and Chas. H. Garnett,
Attorneys for Plaintiff.

[fol. 15] EXHIBIT "A" TO PETITION

Benjamin Harrison to Edgar N. Sweet, David H. Hammons, Levy E. Coe, Trustees

United States of America, to all whom these presents shall come, Greeting:

Certificate No. 2

Whereas Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees of the townsite of Oklahoma City in the second county in Oklahoma Territory in trust for the several use and benefit of the occupants of the townsite of Oklahoma City in said County and Territory according to their respective interests have deposited in The General Land Office of the United States a Certificate of the register of The Land Office at Oklahoma City, Oklahoma Territory Whereby it appears that full payment has been made by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid in Trust as aforesaid according to the provisions of the Act of Congress of the 24th of April, 1820 entitled "An Act making further provisions for the sale of Public Lands" and the Acts supplemental thereto including the Act of May 14th, 1890, for the South East Quarter of Section Thirty Three in township twelve north of Range Three West of Main Meridian in Oklahoma Territory containing One Hundred and Sixty Acres according to the Official Plat of the Survey of the said Lands returned to the General Land Office by the Surveyor General [fol. 16] which said Tract has been purchased by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid.

Now Know Ye that the United States of America in consideration of the premises and in conformity with the several Acts of Congress in such cases made and provided Have Given and Granted and by these presents do give and grant unto the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid in Trust as aforesaid and to their successors the said tract above described to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging unto the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, Trustees as aforesaid in Trust

as aforesaid and to their successors and assigns in Trust as aforesaid.

In Testimony Whereof, I, Benjamin Harrison, President of the United States of America have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the first day of October in the year of our Lord One Thousand Eight Hundred and Ninety and the independence of the United States the one hundred and fifteenth.

By the President, Benjamin Harrison. (Seal.)

[fol. 17] By M. McKean, Secretary, J. W. Townsend, Recorder of the General Land Office. Recorded vol. 9, Pages 383 to 384.

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

This instrument filed for Record on this 10th day of October A. D. 1890 and duly recorded in Book 1, page 58 of Miscellaneous Records.

John M. Martin, County Clerk.

EXHIBIT "B" TO PETITION

Edgar N. Sweet, Frank S. Fay, and David H. Hammons, as Trustees, to Naomá Noble

This indenture made this Twenty-seventh day of December in the year of our Lord One Thousand Eight Hundred and ninety, by and between Edgar N. Sweet, Frank S. Fay (Successor to Levy E. Coe) and David H. Hammons, as trustees for the townsite of Oklahoma City, in the Territory of Oklahoma, parties of the first part, and Naoma Noble, of Oklahoma City, in the County of Oklahoma, and Territory of Oklahoma, party of the second part, Witnesseth:

Whereas, said parties of the first part have been appointed trustees for said townsite by the Secretary of the Interior, under the provision of the Act of Congress approved May 14, 1890, entitled, "An Act to provide for

townsite entries of lands in what is known as 'Oklahoma' and for other purposes,"

[fol. 18] Whereas, pursuant to said appointment as such trustees, said parties of the first part have duly qualified and entered upon the performance of their duties as such, as provided in said act and the regulations of the Secretary of the Interior for their guidance, and

Whereas, on the third day of September, A. D., 1890, said parties of the first part, as such trustees, entered the Southeast Quarter of Section thirty-three, Township twelve North of Range three West, in said Territory, upon which said townsite is situate, in trust for the several use and benefit of the occupants thereof, according to their respective interests, and have made survey thereof into lots, blocks, squares, streets and alleys, and have assessed upon each of the lots on said townsite the sums of money contemplated by the provisions of said act, and

Whereas, said trustees find that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises therein as hereinafter described, and

Whereas, said party of the second part has paid the assessments upon said property amounting to the sum of Three and 75/100 Dollars;

Now, Therefore, said parties of the first part, as such Trustees, by virtue of the power vested in and conferred upon them by the terms of said Act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents do grant, convey and confirm unto the [fol. 19] said party of the second part, and her heirs and assigns, all the following lot, piece and parcel of land situate in the town of Oklahoma City, County of Oklahoma, and Territory of Oklahoma, described as follows: to wit:

Lot No. Six (6) in Block No. Thirty-six (36) as same appears from the original plat and survey of said city as approved by said Board and now on file under the provisions of said Act of Congress,

To have and to hold the same, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever:

In Witness Whereof, said parties of the first part, as

such trustees, have hereunto set their hands and seals, on the day and year first above written.

Edgar N. Sweet (Seal), Frank S. Fay (Seal), David H. Hammons (Seal), Trustees for the Townsite of Oklahoma City, Okla., Territory.

In Presence of: Ralph Guthrie.

TERRITORY OF OKLA.,
Oklahoma County, ss:

Be it remembered, That on this Twenty-Seventh day of December, A. D., 1890, before me, a County Clerk, came Edgar N. Sweet, Frank S. Fay and David H. Hammons, to me personally known to be the trustees of said townsite of Oklahoma City, and the identical persons described in, and [fol. 20] whose names are affixed to the foregoing conveyance, as grantors, and they severally acknowledged the execution of the same to be their voluntary act and deed, as such trustees, for the uses and purposes mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, on the day and year first above written.

John M. Martin (Seal), County Clerk.

Endorsed on back as follows: Territory of Oklahoma, Oklahoma County, ss. I hereby certify this instrument was filed for record in my office at 11:15 o'clock, A. M., January 21, 1891.

John M. Martin, County Clerk.

Recorded in Book 2 at page 519.

[fol. 21] EXHIBIT "C" TO PETITION

Mrs. Naoma Noble and George Noble, Her Husband, to The Choctaw Coal and Railway Co.

This deed made this 28th day of March in the year of our Lord One Thousand Eight Hundred and Ninety One Between Mrs. Naoma Noble and George Noble, her husband, parties of the first part and the Choctaw Coal and Railway Company, a Railway Corporation, party of the second part.

Witnesseth, that the said parties of the first part for and in consideration of the sum of One Dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents Remise, Release, and Quit Claim unto the said party of the second part and to its successors and assigns all their right, title, interest, claim and demand in and to the following described tract, piece and parcel of land situated, lying and being in the County of Oklahoma, Territory of Oklahoma, namely

Forty feet off the North end of Lot No. 6, in Block 36, in the City of Oklahoma and County aforesaid, Being intended for the use and occupation of said party, its successors and assigns, as and for its right-of-way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit claimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns [fol. 22] for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To Have and To Hold the same to the party of the second part and to its successors and assigns to the sole and proper use, benefit and behoof of the said party of the second part, its successors and assigns forever, for the uses and purposes herein before set forth.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Executed in the presence of A. A. Barnes.

Naoma (her X mark) Noble (Seal), George Noble (Seal).

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

Be it remembered that on this 28 day of March A. D. Eighteen Hundred and Ninety-one Before me, the undersigned, a notary public for the County and Territory aforesaid, came Naoma Noble and George Noble who are personally known to me to be the same persons who executed

the foregoing instrument of writing and duly acknowledged the execution of the same.

In witness whereof I have hereunto set my hand and [fol. 23] affixed my official seal the day and year above written.

James Shear, Notary Public, Oklahoma County, Okla. Terr'y. (Seal.)

My Com. Ex. 17 day of Feb. 1895.

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

This instrument filed for record this 29 day of March A. D., 1895, at 5 P. M.

G. A. Beidler, Reg. of Deeds.

EXHIBIT "D" TO PETITION

Certificate of Public Convenience and Necessity

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 9th day of April, A. D. 1928

Finance Docket No. 6665

Abandonment and Construction by Chicago, Rock Island & Pacific Ry. Co. et al.

Investigation of the matters and things involved in this proceeding having been had, and the commission having, [fol. 24] on the date hereof, made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity (a) permit an abandonment by the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company of the line of railroad in Oklahoma County, Okla., described in the application; and (b) require the construction by said Choctaw, Oklahoma & Gulf Railroad Company and the

Chicago, Rock Island & Pacific Railway Company of a new Passenger station in Oklahoma City, Okla., and the line of railroad in Oklahoma County, Okla., described in the application and report aforesaid.

[File endorsement omitted.]

Upon the filing of the foregoing petition summons was duly issued out of said court and was served on the defendant and returned into said court in manner and form as provided by law (C-M. 19-23).

[fol. 25] In the District Court of Oklahoma County

[Title omitted]

Answer and Cross Petition—Filed March 4, 1931

Comes now the defendant, the City of Oklahoma City, and for answer says:

I

That it denies each and every material allegation contained in plaintiff's petition not hereinafter specifically admitted.

II

And for further answer defendant says:

[fol. 26] That it admits that it is a duly organized municipal corporation and a city of the first class, under the laws of the state of Oklahoma, and possesses all the political, governmental, legislative and corporate powers delegated to a city of the first class as alleged in plaintiffs' petition.

2. That it denies that the plaintiffs are the owners in fee simple of the full title both legal and equitable in and to the land described in plaintiffs' petition and further specifically denies that the defendant wrongfully detains the possession of said land from plaintiff and that plaintiff is entitled to immediate possession thereof.

3. (a) Defendant admits that there was executed and delivered to Edgar N. Sweet, Levy E. Coe, and David H. Hammond, as Trustees of the townsite of said Oklahoma City, the patent described in plaintiffs' petition, a copy of which is set forth as Exhibit "A" thereto, but defendant alleges that long prior to the date of execution and delivery of said patent, the land involved in this suit and alleged to have been included in said patent, had been granted by Acts of Congress of the United States to the Choctaw Coal and Railway Company, a corporation, as a right of way and station grounds for a railroad line to be built by said railway company. That the terms and conditions of said grant, as contained in said Acts of Congress, had been fully accepted by the said Choctaw Coal and Railway Company prior to the date of execution and delivery of said patent, and were being fully complied with by said railway company with the approval of the Secretary of Interior [fol. 27] and the Congress of the United States, and that said land was not public lands of the United States subject to be conveyed to the grantees in said patent or to any other person but was long prior to time of the alleged conveyance the property of the said Choctaw Coal and Railway Company. That the General Land Office had no power or authority whatsoever to convey the land described in plaintiffs' petition or any part thereof to grantees therein named, and that said patent was wholly void and of no effect and conveyed no right, title or interest in and to the said land, and wholly failed to give any power or authority to the grantees in said patent or any of them to convey any right, title or interest in and to said land or any part thereof, as alleged in plaintiffs' petition.

That the Acts of Congress hereinbefore referred to are one taking effect February 18, 1888, Chapter 13, 25 U. S. Statutes at Large p. 35, and one taking effect February 13, 1889, Chap. 152, 25 U. S. Statutes at Large p. 668.

(b) Defendant has no knowledge as to whether or not the said townsite trustees executed and delivered to Naoma Noble the deed described and set forth as Exhibit "B" to plaintiffs' petition, and defendant, therefore, specifically denies that such deed was executed and delivered. But defendant avers that if such deed was executed and delivered, which is not admitted but it is hereby expressly denied, the

said Naoma Noble, by reason of the facts hereinbefore alleged, acquired no right, title or interest in and to said land [fol. 28] or any part thereof, by virtue of said deeds.

(c) Defendant has no knowledge as to whether or not Naoma Noble is deceased and that she left surviving her the plaintiff Geo. Noble, her husband, and William Noble, her son, as her sold surviving heirs and defendant, therefore, specifically denies that the said Naoma Noble is deceased and that the said plaintiffs were heirs as alleged in plaintiffs' petition.

4. (a) Defendant has no knowledge as to whether or not the said Naoma Noble made, executed and delivered to the Choctaw Coal and Railway Company the alleged deed described in paragraph four of plaintiffs' petition, copy of which is set forth as Exhibit "C" thereto, and defendant therefore specifically denies that such deed was executed and delivered. But defendant avers that if such deed was executed and delivered as alleged, which is not admitted, but is hereby expressly denied, the said Naoma Noble by reason of the facts aforesaid, had no right, title, interest, or estate to or in said lands at the time of the execution and delivery of said deed, and that said deed and conditions therein stated were wholly inaffective to give to plaintiffs or reserve in her or plaintiffs' favor any valid claim or title to a reversionary or any other interest in said land; and that plaintiffs have now no right, title or interest in or to said land or valid claim thereto.

(b) Defendant has no knowledge as to whether or not a portion of the land described in plaintiffs' petition was ever [fol. 29] shown by the townsite plat of said Oklahoma City as a part of a twenty foot alley of said City extending east and west through the City block as laid out and designated by said plat as a public highway, nor has defendant any knowledge as to whether or not in April, 1891, an ordinance was duly and legally passed and adopted vacating the alleged alley and attempting to grant said Choctaw Coal & Railway Company a permanent franchise and right to use said alley for a railroad right of way and for railroad purposes, as alleged in plaintiffs' petition, and therefore, defendant specifically denies that any part of said land ever legally constituted a part of a public alley of said

Oklahoma City and that such an ordinance as that described in plaintiffs' petition was regularly passed and adopted. But defendant alleges that if any part of said land was ever designated in any plat as a part of a public alley, which is not admitted, but is hereby expressly denied, the land being the property of the said Choctaw Coal & Railway Company was improperly and illegally platted as a public alley and that if the said City passed such an ordinance as that hereinbefore described, which is not admitted but is hereby expressly denied, it only gave the said railway company the right to use and occupy said alleged alley for railroad purposes and did not have the effect of releasing defendants' title to the said alley, if any it had, so that upon abandonment of said alley for railroad purposes the title thereto accrued to the abutting property owners.

[fol. 30] (c) Defendant admits that the property described in plaintiffs' petition including the alleged alley has been used and occupied by the Choctaw Coal and Railway Company and the Choctaw Oklahoma and Gulf Railroad Company, a corporation, as its successor and by the Chicago, Rock Island and Pacific Railway Company, a corporation, as lessee of said Choctaw Oklahoma and Gulf Railroad Company, continuously to the 4th day of December, 1930, when the said Choctaw Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company vacated said land. But defendant specifically denies that the date of possession of the Choctaw Coal and Railway Company began upon the date of the execution and delivery of the alleged deed from Naoma Noble to said railway company and avers that at the time the said townsite trustees obtained their said patent and the said plaintiffs obtained their said alleged deed from said trustees, and for a long time prior thereto, the said Choctaw Coal & Railway Company was the owner of said land as aforesaid and was constructing, if not operating its line of railroad thereon, and was occupying and using said land for railroad purposes, all of which was well known to the said grantees in said United States patent and to said Naoma Noble, and George Noble.

(d) Defendant admits that on or about the 17th day of November, 1927, the Choctaw, Oklahoma & Gulf Railroad

Company and the Chicago, Rock Island and Pacific Railway Company entered into a contract with defendant whereby they agreed for a valuable consideration to con-
[fol. 31] vey to the defendant by quit claim deed all their right, title and interest in and to the real estate described in plaintiffs' petition and to discontinue the use and occupation of said land and vacate and abandon the same for railway and right of way purposes as alleged in plaintiffs' petition, but defendant specifically denies that said deed was and is ineffective to convey title to the defendant.

(e) The defendant further admits that the said railroad companies made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line of railroad through said City of Oklahoma City; and defendant further admits that, acting upon said application, the Interstate Commerce Commission of the United States, did, on the 9th day of April, 1928, issue a certificate of Public Convenience and Necessity, granting permission of said railroad companies to vacate and abandon said right of way including the land described in plaintiffs' petition and that Exhibit "D" attached to said petition is a true and correct copy of said certificate.

(f) Defendant further admits that on the 4th day of December, 1928, the said Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company executed and delivered to the defendant an instrument of conveyance of the property involved in this suit, termed a quit claim deed, by which said railroad
[fol. 32] companies conveyed all their right, title and interest in and to the land involved in this suit, as alleged in plaintiffs' petition, but defendant specifically denies that said quit claim deed was and is ineffectual to convey title to said lands and defendant further admits that on the 4th day of December, 1930, the Railroad Companies abandoned the use of said land for right of way and railroad purposes and ceased to use and occupy the same and that said railroad companies took up and removed all railroad tracks therefrom and delivered possession of said land to the defendant as alleged in plaintiffs' petition.

(g) Defendant further admits that upon the abandon-

ment of said land by said railroad companies, as aforesaid, the defendant entered into possession of said land and has ever since retained and still does retain the possession thereof, to the exclusion of the plaintiffs, therefrom and defendant further admits that it is not now holding, occupying and using said land, nor does it intend to occupy, use and hold said land or any part thereof, for railroad right of way or for any railroad purposes whatever, but defendant avers that it now holds, uses and occupies the same and intends to hold, use and occupy the same as a public park of said City and for public use as such park, as alleged in plaintiffs' petition.

5. (a) Defendant admits that when the railroad companies discontinued the use and occupation of said land [fol. 33] as and for a right of way and for railroad purposes, their title thereto was defeated and terminated, upon a decree being entered in the United States District Court in and for the Western District of the State of Oklahoma, finding, holding and declaring that such railroad companies had so abandoned said property, and defendant specifically denies that upon such abandonment the full fee simple title to said real estate reverted to the plaintiffs, and that they became entitled immediately to re-enter and take possession of said land under the terms and provisions of said alleged deed, copy of which is attached to plaintiffs' petition, as Exhibit "C" and the defendant alleges that by reason of the facts hereinbefore stated, the said plaintiffs do not now have, nor have they ever had any right, title or interest in and to said property, nor have they ever had any lawful claim to or right of possession of said land or any part thereof. That the fee simple title to said land and the right of possession thereof belongs to defendant.

(b) Defendant further specifically denies that when the use and occupation of said alley for right of way and railroad purposes was abandoned by said railroad companies, it or any part thereof reverted to the plaintiffs. And defendant alleges that by reason of the Acts of Congress and the facts aforesaid, the plaintiffs did not acquire any right of reversion or any other interest in said alley or any other property described in their petition, upon the said land being abandoned for railroad purposes.

[fol. 34] That by express provisions of an Act of Congress which went into effect March 8, 1922, Chap. 94, 42 U. S. Stat. at Large 414, and the facts hereinbefore alleged, the said property described in plaintiffs' petition became the property of defendant upon a decree of the said United States District Court being entered, finding, holding and declaring that said property had been abandoned for railroad purposes and the defendant now owns said property and has the right of possession thereof.

III

For further answer the defendant says:

1. That Congress of the United States passed an Act which was approved on the 18th day of February, 1888, Chap. 13, 25 U. S. Statutes at Large, p. 35, granting the Choctaw Coal and Railway Company, a corporation, created under and by virtue of the laws of the State of Minnesota, a right of way through the Indian Territory, upon which to locate, construct, operate and maintain a railroad from a point on Red River (the southern boundary line of Indian Territory) at a bluff known as Rocky Cliff, in the Indian Territory and running thence by the most feasible and practicable route through the said Indian Territory, to a point on the East boundary line immediately contiguous to the West boundary line of Polk or Sevier Counties in the State of Arkansas; also a branch line of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a westerly or northwesterly direction to the leased coal veins of said [fol. 35] Choctaw Coal and Railway Company in Tobucksey, County, Choctaw Nation; with a right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to costruct along and upon the right of way and depot grounds provided for in said Act.

2. That said corporation was authorized by said Act of Congress to take and use for all purposes of railway a right of way 100 feet in width through said Indian Territory for said main line and branch of the Choctaw Coal & Railway Company and to take and use a strip of land 200 feet in width with a length of 3000 feet, in addition to said right of way, for stations for every ten miles of said road,

with the right to use such additional grounds where there were heavy cuts or fills as may be necessary for the construction and maintenance of the road bed and extending 100 feet in width on each side of said right of way.

That a copy of said Act of Congress is hereto attached, marked Exhibit "A" and made a part hereof.

3. That subsequently Congress of the United States passed an Act which was approved February 13, 1889, Chap. 152, 25 U. S. Statutes at Large p. 668, amending the Act of February 18, 1888, aforesaid, and granting an extension of right of way to the said Choctaw Coal and Railway Company under the same terms and conditions as that granted under said Act approved February 18, 1888, as aforesaid, from the said leased coal veins of said Choctaw Coal & Railway Company in Tobucksey County, Choc- [fol. 36] taw Nation, in a Westerly or Northwesterly direction by the most feasible and practicable route to an intersection with the line of the Atchison, Topeka & Santa Fe Railway Company at the most convenient point between Halifax Station and Ear Creek, otherwise known as the North Canadian River, with the right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to construct along and upon the right of way and depot grounds provided for in said Acts.

That a copy of said Act of Congress approved February 13, 1889, is herto attached, marked Exhibit "B" and made a part hereof.

4. That immediately after the taking effect of the said Act of Congress approved February 13, 1889, as aforesaid, the said Choctaw Coal and Railway Company, in compliance with the terms and provisions of said Acts of Congress selected and located the general route and line of its railway as in said Acts provided, and thereafter fully complied with all the terms and conditions thereof.

5. Defendant further alleges that the selection of said right of way by the said Choctaw Coal and Railway Company and the location and construction of said line of railroad upon said right of way and over and across the land described in plaintiffs' petition and sought to be recovered herein was fully approved in all things by the Secretary of the Interior of the United States and by Congress ex-

pressly and impliedly in various and divers Acts as will [fol. 37] more fully hereinafter appear.

6. That on the 21st day of February, 1891, an Act of Congress was approved by which the time was extended for the construction and completion of said Railway for a period of two years from the 18th day of February, 1892. That Congress thereafter passed an Act, which was approved January 22, 1894, extending the time for the completion of said railroad to February 18, 1896.

Copies of said Acts are hereto attached, marked Exhibits "C" and "D" and made a part hereof.

7. That in the year 1894, the said Choctaw Coal & Railway Company became insolvent and all of its property and franchises were on September 8, 1894, sold to Geo. H. Earl, Jr., Sidney F. Tyler, Frances I. Gowan, Geo. B. Kirkbride and Nicholas Thuron, by orders and judgments entered in the United States Court for Second Judicial Division of Indian Territory, sitting at McAlester, Indian Territory, and in the District Court of Oklahoma County, in an ancillary proceeding to the receivership proceeding in said court at McAlester, Indian Territory, and the District Court of Canadian County in an ancillary proceeding to that in the said United States Court at McAlester, Indian Territory. That said sale was not only made with the approval of the United States Court for said second Judicial Division of the Indian Territory and the other courts aforesaid, but with the approval of the Congress of the United States, said approval being given by Act approved August 24th, [fol. 38] 1894, wherein the above named purchasers of the property and franchises of the Choctaw Coal and Railway Company were granted specific authority to organize a corporation to take over said property and franchise of said Choctaw Coal and Railway Company; said Act of Congress being published as Chapter 330, 28 Statutes, at Large, p. 502, is hereto attached marked Exhibit "E," and made a part of this Answer.

8. That after the sale of all the property and franchises of said Choctaw Coal & Railway Company, as aforesaid, the said purchasers duly organized under the laws of the United States, the Choctaw, Oklahoma & Gulf Railroad Company, which succeeded to the absolute ownership of all the rights, property and franchises, including right of

way and station grounds belonging to the said Choctaw Coal and Railway Company, and that the Congress of the United States passed an Act which was approved April 24th, 1896, recognizing the said Choctaw Oklahoma & Gulf Railroad Company as the purchasers of and successors to all the said property franchises and rights of the said Choctaw Coal and Railway Company, and especially finding, ascertaining and declaring that the said Choctaw, Oklahoma & Gulf Railroad Company and its predecessor in interest, to-wit: the Choctaw Coal & Railway Company had fully complied with all Congressional Acts and requirements as to the selection of right of way and station grounds, the location and construction of said railroad over the lands of the various Indian tribes and the lands [fol. 39] belonging to the United States, including that described in plaintiffs' petition. That said Act of Congress comprises Chapter 122, 29 U. S. Statutes at Large, p. 98, a copy of said statute is hereto attached and marked Exhibit "F" and made a part of this Answer.

9. That at the time of the passage and approval of the said Acts of Congress approved February 18, 1888, and February 13, 1889, the land which is now embraced in Oklahoma City including the land described in plaintiffs' petition, belonged to the Creek Nation of Indians and the United States. That said Creek Indians obtained said land by Treaty with the United States, bearing date February 14, 1833. That in the year 1866, the said Creek Nation of Indians by Treaty dated June 14, 1866, conveyed said lands to the United States for the purpose of locating other civilized tribes of Indians thereon.

10. That by Treaty dated January 19, 1889, the Creek Tribe of Indians completely relinquished all claims to this western land, including all the land in what is now Oklahoma City, North of the North Canadian River.

11. That by reason of these treaties and relinquishments aforesaid, the title of the United States to this Creek Indian land became absolute on the 19th day of January, 1889, save and except the title to the right of way and station grounds previously expressly granted to the Choctaw Coal and Railway Company as aforesaid, and certain other tracts of land and reservations, not involved in this suit.

[fol. 40] 12. That the land sought to be recovered by plaintiff in this suit was never open to settlement as a part of the public lands of the United States. That the Congress in said Act, approved March 2, 1889, which provided for the opening of the Country, including that in and around Oklahoma City specifically reserved all rights of way previously granted by it to railroad companies. That thereafter, towit: on the 23rd day of March, 1889, Benjamin Harrison, President of the United States, in his Proclamation opening the Country in and around Oklahoma City for settlement at 12:00 o'clock noon, April 22nd, 1889, expressly set forth in said Proclamation that the Country was opened under terms of and subject to all the conditions, limitations and restrictions contained in said Act of Congress approved March 2nd, 1889, and the laws of the United States applicable thereto. That Congress of the United States and the President, in the manner aforesaid, expressly withheld said land from claim and settlement of all persons.

13. Defendant further alleges that the Organic Act which took effect May 2, 1890, expressly recognized rights of way and land for station grounds previously granted to railroad corporations as the property of such railroad corporations and not subject to settlement or the claim of any person who might attempt to settle upon or lay claim to said right of way and station grounds or any part thereof.

14. Defendant further alleges that at the time the said Naoma Noble and George Noble originally attempted to [fol. 41] settle upon and acquire rights in said land they had actual and constructive notice of said Acts of Congress which took effect February 18, 1888 and February 13, 1889, and that the land was located upon the route from the coal leases of said railway company in Tobucksey County, Choctaw Nation to a place on the A. T. & S. F. line of railroad between Halifax and North Canadian River, as designated by said Acts of Congress; that said railway company had accepted the terms of said Acts and that it was then complying with all the terms and conditions thereof and owned the title to said land. And defendant further alleges that the said Naoma Noble and George Noble had actual and constructive notice of the Act of Congress opening the country for settlement and the President's said Proclamation and knew that the land described in plaintiffs' petition

was not open to settlement and the rightful claim of any person whatsoever save and except the said Railway Company, and that his attempt to acquire title to said land or an interest therein was contrary to the laws of the United States and the terms of said Proclamation, and in violation of the rights of said railway company as defined and set forth in said Acts of Congress.

Defendant further alleges that if the terms of said patent to said townsite trustees are broad enough to include the land owned by said railway company and claimed by plaintiff as aforesaid, the United States Land Office was wholly without authority by reason of the facts hereinbefore alleged, to include said land in said patent and did not intend [fol. 42] to include the same therein; and that said townsite trustees took said patent with actual and constructive notice of said Acts of Congress and all the facts aforesaid including the ownership of said land by said railway company.

And defendant further alleges that if the said Naoma Noble did acquire a deed from said townsite trustees, which is not admitted but is hereby expressly denied, she acquired said deed with actual and constructive notice of the said rights and title of said railway company as hereinebefore alleged and knew at the time that said deed conveyed to her no right, title or interest in said land or any part thereof.

The defendant therefore charges and alleges, that by reasons of the Acts of Congress, the President's Proclamation, and the facts aforesaid the said Naoma Noble never acquired any right, title or interest in said land or any part thereof, and that now plaintiffs have no right, title or interest therein.

15. Defendant further avers that Congress passed an Act which was approved March 3, 1905, whereby it authorized the Choctaw Oklahoma & Gulf Railroad Company to lease or sell its line of railroad running over the land involved in this suit to the Chicago Rock Island & Pacific Railway Company. That said Act of Congress is published in 33 United States Statutes at Large, p. 991, to which reference is hereby made and same is hereby adopted as a part of this Answer. That pursuant to said Act of Con- [fol. 43] gress the said Choctaw, Oklahoma & Gulf Railroad Company leased all the property and franchises of

the said Choctaw, Oklahoma & Gulf Railroad Company, comprising the right of way and station grounds including the property described in plaintiffs' petition, to the said Chicago, Rock Island & Pacific Railway Company, for nine hundred and ninety nine years.

16. Defendant further avers that the said Choctaw Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line of railroad through Oklahoma City, Oklahoma, including that part of the line which runs over the property described in plaintiffs' petition and that on the 9th day of April, 1928, the said Interstate Commerce Commission granted the Certificate of Public Convenience and Necessity as applied for, which is in letters, figures and terms as plaintiffs' Exhibit "D," attached to their petition.

17. Defendant further alleges that on the 4th day of December, 1928, the said Railroad Companies, for a valuable consideration, executed and delivered to defendant an instrument of conveyance termed a Quit Claim Deed, whereby said Railroad Companies conveyed all their right, title and interest in and to all said abandoned right of way and station grounds, including the real estate described in [fol. 44] plaintiffs' petition as alleged in his petition.

18. That thereafter, on the 4th day of December, 1930, the said railroad companies wholly abandoned their right of way and station grounds over and upon the land described in plaintiffs' petition and delivered possession thereof to the defendant and thereafter, on the said 4th day of December, 1930, the United States District Court, in and for the Western District of Oklahoma, in the case of The City of Oklahoma City, Oklahoma, a Municipal Corporation, Complainant, vs. The Chicago, Rock Island & Pacific Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company, a corporation, defendants, the said case bearing Docket No. 1174 in Equity, entered a decree holding and declaring that the said railroad companies on the 4th day of December, 1930, wholly abandoned the said right of way and station grounds including the property described in plaintiffs' petition and that under

and by virtue of the Act of Congress approved March 8, 1922, 42 U. S. Statutes at Large, p. 414, U. S. C. A. Chap. 43, Section 912, all the right, title, claim and interest in and to said property became absolutely vested in fee simple in the defendant.

A copy of the said decree is hereto attached, marked Exhibit "G" and made a part hereof.

19. Defendant further charges and alleges that the plaintiff never at any time had any right, title or interest or valid claim in or to the land described in his petition or any part thereof. That the defendant, by reason of the [fol. 45] facts aforesaid, being a municipal corporation, through which said abandoned right of way runs, became the owner thereof upon abandonment and the judicial determination thereof, as aforesaid and is now the owner of the fee title to said land.

Cross Petition

For cross petition against the plaintiffs the defendant hereby adopts by reference, all the facts and allegations made and set forth in Counts II and III of its Answer herein and makes the same as much a part of this Cross Petition as if fully set out herein by re-writing, and alleges further:

That said alleged deed of Naoma Noble and plaintiffs' claim to the land is wholly unfounded and without right, but notwithstanding this fact, said alleged deed and claim constitute a cloud upon defendant's title to said land and renders the title thereto objectionable and if permitted to remain upon and against said land the defendant will suffer irreparable injury, damage and loss, by reason thereof.

Wherefore, premises considered, defendant prays that the plaintiffs take nothing by this action; that said alleged deed to Naoma Noble be cancelled and held for naught, in so far as the said deed relates to the property described in plaintiffs' petition and that the fee simple title to said land be decreed in defendant and fully quieted in defendant [fol. 46] as against plaintiffs and all persons whomsoever; and that all persons claiming by, through or under plaintiffs be forever barred and enjoined from asserting claim to any title or interest to or in said land or any part thereof, and that defendant recover all costs and be granted such

other further and different relief as to the Court may seem equitable and proper in the premises.

A. L. Hull, Municipal Counselor; W. H. Brown, Special Assistant, Attorneys for Defendant.

[fol. 47] EXHIBIT "A" TO ANSWER

United States at Large, 50th Congress

1887-1889

Session I, Ch. 13, 1888, Vol. 25, page 35

Chap. 13.—An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the State of Minnesota, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on Red River (the southern boundary line) at the bluff known as Rocky Cliff in the Indian Territory, and running thence by the most feasible and practicable route through the said Indian Territory to a point on the east boundary line, immediately contiguous to the west boundary line of Polk or Sevier Counties in the State of Arkansas; also, a branch line of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company in Tobucksey County, Choctaw Nation; with the right to construct, use, [fol. 48] and maintain such tracks, turnouts, branches and sidings and extensions as said company may deem it in their interest to construct along and upon the right of way and depot grounds therein provided for.

Sec. 2. That said corporation is authorized to take and use and for all purposes of railway, and for no other pur-

poses, a right of way one hundred feet in width, through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ~~then~~ miles of road, with the right to use such additional grounds where there are heavy cuts or fills as may be necessary for the construction and maintenance of the roadbed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill; Provided, That no more than said addition of land shall be taken for any one station; Provided Further, that no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purpose only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken.

[fol. 49] Sec. 3. That before said railway shall be constructed through any lands held by individual occupants according to the laws, customs, and usages of any of the Indian Nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant such compensation shall be determined by the appraisement of three disinterested referees, to be appointed, one (who shall act as chairman) by the President, one by the chief of the nation to which said occupant belonged, and one by said railway company, who, before entering upon the duties of their appointment, shall take and subscribe before a district judge, clerk of a district court, or United States Commissioners, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to, and filed with the Secretary of the Interior within sixty days from the completion thereof; and a majority of said referees shall be competent to act in case of the absence of a member, after due notice. And upon the failure of either party

to make such appointment within thirty days after the appointment made by the President, the vacancy shall be filled by the district judge of the court held at Fort Smith, Arkansas, or by the district judge of the northern district of Texas, upon the application of the other party. The chairman of said board shall appoint the time and place [fol. 50] for all hearings, within the nation to which said occupant belongs. Each of said referees shall receive for his services the sum of four dollars per day for each day they are engaged in the trial of any case submitted to them under this Act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said nations. Costs, including compensation of the referees, shall be made a part of the award, and be paid by such railroad company. In case the referees cannot agree, then any two of them are authorized to make the award. Either part- being dissatisfied with the findings of the referees shall have the right within ninety days after the making of the award and notice of the same, to appeal by original petition to the district court for the northern district of Texas, which court shall have jurisdiction to hear and determine the subject-matter of said petition, according to the laws of the State in which the same shall be heard provided for determining the damage when property is taken for railroad purposes. If upon the hearing of said appeal the judgment of the court shall be for a larger sum than the award of the referees the costs of said appeal shall be adjudged against the railway company. If the judgment of the court shall be for the same sum as the award of the referees, then the costs shall be adjudged against the appellant. If the judgment of the court shall be for a smaller sum than the award of the referees, then the costs shall be adjudged against the party claiming damages. When proceedings have been commenced in [fol. 51] court, the railway company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railroad.

Sec. 4. That said railway company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Arkansas and Texas for services and transportation of the same

kind; Provided, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a State government or governments shall exist in said Territory with (in) the limits of which said railway, or a part thereof, shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freight within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State; Provided, However, That the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed and Providing Further, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such [fol. 52] rate is fixed by law the Postmaster-General may fix the rate of compensation.

Sec. 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nation or tribes through whose lands the said railway may be located, the sum of fifty dollars, in addition to compensation provided for in this Act, for property taken and damages done to individual occupants by the construction of the railway; for each mile of railway that it may construct in said Territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded: Provided, That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location as set forth in section six of this Act dissent from the allowance hereinbefore provided for, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this Act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right to appeal to the courts upon the same terms, conditions, and requirements as therein provided; Provided Further, That the amount awarded or

adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the foregoing provision. Said company shall also [fol. 53] pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum for each mile of railway it shall construct in the said Territory. The money paid to the Secretary of the Interior under the provisions of this Act shall be apportioned by him, in accordance with the laws and treaties now in force, between the United States and said nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their land; Provided, That Congress shall have the right so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit; and any Territory or State hereafter formed, through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this Act.

Sec. 6. That said company shall cause maps showing the route of its located lines through said Territory to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid against said company; Provided, [fol. 54] That when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void; and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any section shall be begun.

Sec. 7. That the officers, servants, and employees of said company necessary to the construction and management of said road shall be allowed to reside, while so managed, upon such right of way, but subject to the provisions of

the Indian intercourse, and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws.

Sec. 8. That the United States circuit and district courts for the Western district of Arkansas and the northern district of Arkansas and the northern district of Texas, and such other courts as may be authorized by Congress, shall have, without reference to the amounts in controversy, concurrent jurisdiction over all controversies arising between said Choctaw Coal and Railway Company and the nations and tribes through whose territory said railway shall be constructed. Said courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distrinction as to [fol. 55] citizenship of parties, so far as may be necessary to carry out the provisions of this Act.

Sec. 9. That said railway company shall build at least one hundred miles of the railway in said Territory within three years after the passage of this Act, and complete the main line of the same within said Territory within one year thereafter, or the rights herein granted shall be forfeited as to that portion not built; that said railroad company shall construct and maintain continually all road and highway crossings and necessary bridges over said railway wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same.

Sec. 10. That the said Choctaw Coal and Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant or land, or its occupancy, than is hereinbefore provided: Provided, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this Act.

Sec. 11. That all mortgages executed by said railway company conveying any portion of its railroad, with its [fol. 56] franchises, that may be constructed in said Indian Territory shall be recorded in the Department of the Interior, and the record thereof shall be evidence and notice of their execution, and shall convey all rights and property of said company as therein expressed.

Sec. 12. That Congress may at any time amend, add to, alter, or repeal this Act.

Sec. 13. That the right of way herein and hereby granted shall not be assigned or transferred in any form whatever prior to the construction and completion of the road, except as to mortgages or other liens that may be given or secured thereon to aid in the construction thereof.

Approved, February 18, 1888.

[fol. 57] EXHIBIT "B" TO ANSWER

United States Statutes at Large, 50th Congress

1887-1889

Session II, Ch. 152, 1889, Vol. 25, Page 668

Chap. 152.—An Act to amend an Act entitled "An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes, "approved February eighteenth, eighteen hundred and eighty-eight."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That section one of the Act entitled "An Act to Authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes," approved February eighteenth, eighteen hundred and eight-eight, be, and hereby is, amended to read as follows:

"That the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the State

of Minnesota, be, and the same is hereby invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on the Red River (the southern boundary line), at the bluff known as Rocky Cliff, in the Indian [fol. 58] Territory, and running thence by the most feasible and practicable route through the said Indian Territory to a point on the east boundary-line of the State of Arkansas; also, a branch line of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a westerly or northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company, in Tobucksey County, Choctaw Nation, and thence by the most feasible and practicable route to an intersection with the Atchison, Topeka and Santa Fe Railway at the most convenient point between Halifax Station and Ear Creek, otherwise known as the north fork of the Canadian River; with the right to construct, use and maintain such tracks, turnouts, branches, and sidings and extensions as said company may deem it in their interest to construct along and upon the right of way and depot grounds herein provided for."

Approved, February 13, 1889.

[fol. 59] EXHIBIT "C" TO ANSWER

United States Statutes at Large, 51st Congress

1889-1891

Session II, Ch. 249, Vol. 26, Page 765

Chap. 249.—An Act to amend Act authorizing Choctaw Coal and Railway Company to construct road through Indian Territory.

Be is enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

That the provisions of an Act approved February eighteenth, eighteen hundred and eighty-eight, authorizing the

Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes, shall be extended for a period of two years, from February eighteenth, eighteen hundred and ninety two, so that said company shall have until February eighteenth, eighteen hundred and ninety-four to build its railway, under the provisions of said Act and the Act amendatory thereof, approved February thirteenth, eighteen hundred and eighty-nine.

Approved February 21, 1891.

[fol. 60] EXHIBIT "D" TO ANSWER

United States Statutes at Large, 53rd Congress

1893-1895

Session II, Ch. 14, Vol. 28, Page 27

Chap. 14.—An Act to extend the time for the construction of the railway of the Choctaw Coal and Railway Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the time for the construction of the railway of the Choctaw Coal and Railway Company, a corporation organized under the laws of the State of Minnesota, which, by the provisions of the Act approved February twenty-first, eighteen hundred and ninety-one, entitled "An Act to amend an Act Authorizing the Choctaw Coal and Railway Company to construct a road through the Indian Territory" will be extended for a period of two years from that date, so that said company shall have until February eighteenth, eighteen hundred and ninety-six, to construct the line of railway authorized by the Act approved February eighteenth, eighteen hundred and eighty-eight, entitled "An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes," and the Act amendatory thereof, approved February thirteenth, eighteen hundred

and eighty-nine, entitled "An Act to amend an Act entitled "An Act to authorize the Choctaw Coal and Railway Com-
[fol. 61] pany to construct and operate a railway through the Indian Territory, and for other purposes, 'approved February eighteenth, eighteen hundred and eighty-eight'' and for such purpose the said company shall have the right to take and occupy the right of way and depot grounds heretofore granted to it by said Acts.

Approved, January 22, 1894.

A statement of the provisions of the Act of Congress of August 24, 1894, 28 Stat. 502, Exhibit E to defendant's answer, is set forth in paragraphs 7 and 8 of the answer, pages 37-38, supra, and the Act is not reproduced here.

[fol. 62] EXHIBIT "F" TO ANSWER

United States Statutes at Large, 54th Congress

1895-1897

Sess. I, Ch. 122, 1898, Vol. 29, P. 98

Chap. 122. An Act to amend an Act approved August Twenty-fourth, eighteen hundred and ninety-four, entitled "An Act to authorize purchasers of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation and to confer upon the same all the power, privileges and franchises vested in that company."

Whereas, pursuant to the authority conferred in and by the Act of which this is amendatory, a corporation was fully organized by the name and style of the Choctaw, Oklahoma and Gulf Railroad Company by the purchasers of the property and franchise formerly of the Choctaw Coal and Railway Company, and it is desirable that the powers of said corporation should be defined as hereinafter provided:

Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the power to construct, and operate branches, including those mentioned in section two of this Act, conferred in and by section four of the Act approved August twenty-fourth, eighteen hundred and ninety-four, entitled "An Act to authorize purchasers of the property and franchises of the Choctaw Coal and Railway Company to organ- [fol. 63] ize a corporation and to confer upon the same all the powers, privileges, and franchises vested in that company; shall be exercisable in the Indian Terriitory only after maps showing the location of such branches shall have been filed with and approved by the Secretary of the Interior.

Sec. 2. That the powers conferred by said section four shall extend to branches intended to aid the development of any coal or timber territory contiguous or tributary to the lines of railroad of the said Choctaw, Oklahoma and Gulf Railroad Company, whether owner or controlled by said company or by others, said branches not to exceed in length five miles, and to the construction and operation of a branch from any point on its existing line of railroad to the northern line of the State of Texas, and for this purpose the said company shall have the like rights, powers, and franchises, as to the acquisition of a right of way and depot grounds, and as to the construction and operation of said branch, and shall be subject to the like conditions and restrictions as it possesses or is subject to under or by virtue of the provisions of the said Act of August twenty-fourth, eighteen hundred and ninety-four as to the line of railroad acquired or constructed thereunder.

Sec. 3. That the line of railroad which has been heretofore constructed shall be regarded and treated as a full compliance by said company with the requirements of the Act applicable to it, by which it was required, as a condition of further construction thereafter, to complete its main [fol. 64] line prior to February eighteenth, eighteen hundred and ninety-six, and said company may exercise from time to time the rights, powers, and franchises heretofore or by this Act conefrred as to further extensions of our branches from its existing line.

Approved April 24, 1896.

[fol. 65] EXHIBIT "G" TO ANSWER

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

In Equity. No. 1174

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a Municipal Corporation, Complainant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, and the Choctaw, Oklahoma and Gulf Railroad Company, Corporations, Defendants

Decree

This cause came on to be heard in regular order, and the complainant was represented by W. M. McKenzie, Municipal Counselor, Solicitor of Record, and the defendants were represented by W. R. Bleakmore, Solicitor of Record, and said cause was submitted to the Court on its merits.

The Court finds that the parties are corporations, as alleged in the Bill of Complaint, and that jurisdiction rests in this Court for the reason that the amount involved is in excess of Three Thousand ($3,000.00) Dollars, and the cause of action arises under and by virtue of the laws of the United States.

The Court further finds that title to the property hereinafter set out was acquired by the defendants under the [fol. 66] Act of February 18, 1888, passed by the Congress, which was amended by various Acts, authorizing construction of lines of railway through a part of the public domain, which was then the Indian Territory, now the State of Oklahoma, and that said lines of railway, pursuant to said Acts, were constructed, and that on the 4th day of December, 1930, the defendants, being owners, lessees and operators of the line of railway over the property hereinafter described, completely abandoned the same, surrendered possession to the City of Oklahoma City on the 4th day of December, 1930, and are now without interest, right, title of equity in and to said property by reason of the abandonment thereof for railroad purposes.

It is by the Court, therefore, decreed that the defendants, Chicago, Rock Island and Pacific Railway Company, and

the Choctaw, Oklahoma & Gulf Railroad Company, have abandoned and forfeited all of their right, title and interest in and to the following described property in the City of Oklahoma City, Oklahoma County, State of Oklahoma, and more particularly described as follows:

The North forty (40) feet of Lots Thirty seven (37) to Forty (40), and the North Forty (40) feet of Lots Twenty-three (23) to Thirty-two (32), and the South Forty (40) feet of Lots Thirteen (13) to Twenty-two (22), and the South Forty (40) feet of Lots Thirty-three (33) to Thirty-Six (36), and all of Lots Five (5), Six (6), Seven, Twenty-[fol. 67] one (21), aforesaid, lying between a line drawn Forty (40) feet North of and parallel to the North line of said East and West alley extended, and a line drawn parallel to and Forty (40) feet South of the South line of said East and West alley extended;

Also that part of Robinson Avenue between Blocks Twenty-one (21) and Thirty-six (36) of the Original Town of Oklahoma City, Oklahoma, lying South of a line drawn parallel to and Fifty (50) feet North of the center line of the vacated East and West alleys in Block Twenty-one (21) and Thirty-six (36), aforesaid, extended, and North of a line drawn parallel to and Fifty (50) feet South of the center line of said vacated East and West alleys extended;

Also the North Forty (40) feet of Lots One (1) to Sixteen (16) and the South Forty (40) feet of Lots Seventeen (17) to Thirty-two (32) in Block Thirty-six (36), in the Original Town of Oklahoma City, and the vacated East and West alley in Block Thirty-six (36) of the Original Town of Oklahoma City, Oklahoma;

Also that part of Harvey Avenue between Blocks Thirty-six (36) and Forty-nine (40) in the original Town of Oklahoma City, lying South of a line drawn parallel to and Fifty (50) feet North of the center line of the vacated East [fol. 68] and West alleys in said Blocks Thirty-six (36) and Forty-nine (49) extended and North of a line drawn parallel to and Fifty (50) feet South of the center line of said vacated East and West alleys extended;

Also the North Forty (40) feet of Lots One (1) to Sixteen (16) inclusive, and the South Forty (40) feet of lots Seventeen (17) to Thirty-two (32) inclusive, in Block Forty-nine (49), in the Original Town of Oklahoma City;

Also the vacated East and West alley in Block Forty-

nine (40) in the Original Town of Oklahoma City, Oklahoma;

Also that part of Hudson Avenue between Blocks Forty-nine (49) and Sixty-four (64) of the Original town of Oklahoma City, Oklahoma, lying South of a line drawn parallel to and Fifty (50) feet North of the center line of the vacated East and West alleys in Blocks Forty-nine (49) and Sixty four (64) extended, and North of a line parallel to and Fifty (50) feet south of the center line of said vacated East and West alleys extended;

Also the North Forty (40) feet of Lots One (1) to Nineteen (19) inclusive, and the South Forty (40) feet of Lots Twenty (20) to Thirty-eight (38) inclusive and the East and West alley in Block Sixty four (64) in the original town of Oklahoma City;

[fol. 69] Also a strip of ground One Hundred (100) feet in width in the Southwest Quarter of Section Thirty-three (33), Township Twelve (12) North, Range Three (3) West, I. M., in Oklahoma County, Oklahoma, being Fifty (50) feet on each side of the center line of the main track of the Choctaw, Oklahoma & Gulf Railroad Company as constructed and located and extending from the west line of Block Sixty four (64) of the Original Town of Oklahoma City, Oklahoma, is a westerly direction a distance of Thirteen Hundred Seventy (1370) feet, more or less, to the West line of Shartel Avenue, extended North across said strip of ground, being formerly the right of way taken by the Choctaw, Coal & Railway Company out of the public domain in said Quarter Section herein last above mentioned and by conveyances assigned, transferred and delivered to the defendants in this action.

All of Lots Four (4), Twenty-seven (27) and Twenty-eight (28), and all of the East Half of Lot Twenty-nine (29); also all of Lots Twenty-four (24), Twenty-five (25) and Twenty-six (26), except the North Forty (40) feet thereof; also all those parts of Lots Twenty-nine (29), Thirty (30), Thirty-one (31) and Thirty-two (32) described as follows:

Commencing on the south line of the right of way of the Choctaw, Oklahoma & Gulf Railroad Company at a point [fol. 70] Twelve and Five-tenths (12.5) feet west of the east line of Lot Twenty-nine (29); thence south Fourteen (14) feet; thence on a quarter circle with a radius of Seven (7) feet to a point Seven (7) feet west and Seven (7) feet

south of the place of beginning; thence west parallel with the south line of said right-of-way to a point three (3) feet east of the west line of Lot Thirty-two (32) aforesaid; thence southwest intersecting the west line of said Lot thirty-two (32) at a point Ten (10) feet south of said right of way; thence north to said right of way; thence east along the south line of said right of way to the place of beginning; all in Block eight (8) of the Original Town of Oklahoma City, Oklahoma.

Also a part of the Southwest Quarter of Section Thirty-three (33), Township Twelve (12) North Range Three (3) West; bounded and described as follows:

Commencing at a point where the North line of the right of way of the St. Louis-San Francisco Railway Company, formerly the Oklahoma Terminal Railroad Company, intersects the southerly line of the right of way of the Choctaw, Oklahoma & Gulf Railroad Company; thence southwesterly along the north right of way of the St. Louis-San Francisco Railway Company a distance of One Hundred Sixty five [fol. 71] (165) feet, more or less, to the west line of Shartel Avenue produced north in said City; thence north along the said west line produced north a distance of Fifty (50) feet, more or less, to the southerly line of the right of way of the Choctaw, Oklahoma and Gulf Railroad Company; thence easterly along said southerly right of way line a distance of One Hundred Sixty (160) feet, more or less, to the point of beginning, containing Four Thousand (4,000) square feet, more or less;

and by virtue of the Act approved March 9, 1922, 42 U. S. Statutes at Large, 414, U. S. C. A. Chap. 43, Section 912, all of the right, title, claim and interest in and to said property hereinabove described, as decreed to be vested absolutely and completely in the complainant, the City of Oklahoma City, Oklahoma, and the title of the complainant is quieted and set at rest against any and all claims, demands or interests of whatsoever nature of the defendants therein.

Witness my hand this 5th day of December, 1930.

Edgar S. Vaught, United States District Judge.

O. K. M. W. McKinzie, Solicitor for Complainant.

O. K. W. R. Bleakmore, Solicitor of Defendants.

Endorsed: Filed December 5, 1930, Theodore M. Filson, Clerk, by Grace O. Butler, Deputy.

[fol. 72] [File endorsement omitted.]

[fol. 73] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted.]

REPLY AND ANSWER TO CROSS PETITION—Filed March 30, 1931

Come now the plaintiffs above named and for their reply to the answer, and answer to the cross petition of the defendant filed herein, allege and say:

1. That they deny every material allegation in said answer and cross petition contained, except such as admit or do not contradict, or are not in conflict with the allegations of their petition, and except such as are hereinafter specifically admitted.

[fol. 74] 2. That they admit the enactment of the several and various Acts of Congress and the promulgation of the proclamation by the President of the United States as pleaded and set forth in the defendant's answer and cross petition, but deny the conclusions and argument drawn therefrom and the construction and interpretation placed thereon by the defendant in its said answer and cross petition, and deny that said Acts of Congress and the said proclamation have the meaning or contain the terms and provisions in precise language or in substance or effect as alleged by the defendant in its said answer and cross petition.

3. That they deny that the Act of Congress approved March 8, 1922, 42 Statutes 414, Title 43, Section 912, U. S. Code, has any application to the subject matter of this action or to the title of the plaintiffs to the real estate involved herein, for that the title to said real estate became vested in Naoma Noble through whom the plaintiffs derive their title, by title derived from the United States more than thirty-one years prior to the enactment of said Act of Congress, and they aver that if it should be deemed and held that said Act of Congress did apply to the subject matter of this action, and to the plaintiffs' title to the real estate involved herein, then said Act of Congress is unconstitutional and void, for that it is in contravention of the Fifth Amendment to the Constitution of the United States in that it would have the effect to deprive the plain-

tiffs of their property without due process of law and to [fol. 75] impair the obligation of a contract.

4. That they aver that under the provisions of the Act of Congress of March 3, 1891, 26 Statutes 1099, Title 43, Section 1166, U. S. Code, the United States may not bring suit to vacate or annul any patent to real estate theretofore issued by it unless such suit is brought within five years after the passage of said Act, and that, therefore, the United States could not by suit, and the Congress could not by the enactment of a statute such as said Act of March 8, 1922, more than thirty-one years after the passage of said Act of March 3, 1891, and the issuance of the patent to the real estate here involved, Exhibit A to the plaintiffs' petition, cancel or annul such patent and revest the title to the real estate therein described, or any part thereof, in the United States.

5. That by reason of its said patent, Exhibit A to the plaintiffs' petition, the United States was and is estopped to assert that the real estate described therein was not public lands and was not a part of the public domain, and was and is estopped to assert that it had and retained any right, title, interest or estate in or to any part thereof, subject to the use of the same for a railroad right of way, which the Congress might dispose of upon the cessation of the use and occupancy thereof for such purpose, and the defendant is likewise estopped to assert any right, title, interest or estate in or to the particular real estate involved in this action as derived by it from the United States under the provisions of said Act of Congress, of March 8, 1922.

[fol. 76] 6. That they aver that the defendant derives all and whatever claim of right, title, interest or estate it may have to the real estate involved in this action by quit claim deed from the Choctaw, Oklahoma and Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company, and that said grantors in said deed derived all of their title thereto as successors to, and by, through and from, the Choctaw Coal and Railway Company, and that it and they were and are estopped, and the defendant as their successor in title is estopped, to deny the title of the said Naoma Noble to said real estate on and prior to the 28th day of March, 1891, by reason of the fact that

the said Choctaw Coal and Railway Company did on said 28th day of March, 1891, purchase, receive and accept from the said Naoma Noble the said right of way deed, Exhibit C to the plaintiffs' petition, which contained the express limitation and condition on the grant of the real estate therein described that if and when the same was abandoned and ceased to be used for railroad purposes, it should revert to the grantor, his heirs or assigns, and thereby said railway company contracted and agreed with the said Naoma Noble that said real estate would revert to him or his heirs when its use for railroad purposes was abandoned and ceased, and the plaintiffs as heirs to the title of the said Naoma Noble to said real estate have all the rights under said right of way deed which said Naoma Noble would have if living.

[fol. 77]. 7. That they aver that the said railroad companies above named, and each and all of them, also were and are estopped, and the defendant as their grantee also is estopped, from denying that the said Naoma Noble was vested with the absolute fee simple title to said real estate on and prior to the — day of April, 1891, and that the plaintiffs are now vested with such title thereto, for that on said date the said Choctaw Coal and Railway Company began a proceeding in the District Court of Oklahoma County, in the Territory of Oklahoma, for the condemnation of a railroad right of way across the said real estate, and alleged in said proceeding that the said Naoma Noble was the owner of said real estate and had refused to sell said railroad company a right of way across the same at a price that said railroad company deemed reasonable and was willing to pay, and prayed that the court appoint commissioners to assess and appraise the value of said real estate and the damages that would be suffered by the said Naoma Noble upon the taking and condemnation of the same for its railroad right of way, and that upon the determination, assessment and payment of such damages, it should be allowed to take, appropriate and use said real estate for its railroad right of way, and pursuant to said application, notice was duly served on the said Naoma Noble and commissioners were duly appointed and qualified, did on the 26th day of May, 1891, file in said court in said proceeding their report of the damages and injury done to the land of the said Naoma

Noble and to him as the owner thereof, and also the dam-
[fol. 78] ages and injury done to other similar lands and the owners thereof, and did in said report fix and determine the amount of such damages and injury to the said Naoma Noble at the sum of $40.00, the said condemnation proceeding being entitled "In the Matter of the application of the Choctaw Coal and Railway Company to condemn certain property in the County of Oklahoma," and being cause No. 212 on the docket of said court.

8. That they aver that the said Choctaw Coal and Railway Company did not take, nor claim, intend or pretend to take, title to its right of way across the real estate involved in this action under and by authority of the provisions of the said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and did not at any time file in the office of the Secretary of the Interior a map showing the route of its located line of road over said real estate, and further that if it did in fact file such a location map showing its line passing over said real estate, which the plaintiffs do not admit, then the same was not filed until after the right of the said Naoma Noble to acquire from the United States the title to the said real estate had attached thereto nor until after it had filed such a location map showing its line passing by and around, and not over and across, the said real estate, which filing of such map exhausted its right to make location of its said line of road under the provisions of said Acts of Congress and it could not thereafter, and after the rights of the said Naoma Noble had [fol. 79] intervened and attached, relocate its said line under the provisions of said Acts of Congress over and across said real estate, and further that it abandoned, relinquished and waived all claim of right to locate and take its right of way across said real estate under the provisions of said Acts of Congress, for that a dispute and controversy arose between it and the said Naoma Noble together with the claimants to and owners of other city lots similarly situated in said City of Oklahoma City, over its said claim of the right to so locate its said line and thereupon, for the purpose of settling said dispute and controversy and enabling the said railway company to proceed to construct its road through said city, an agreement was entered into between said railway com-

pany on the one hand and said city and its citizens on the other whereby it was agreed that said railway company would abandon, withdraw, relinquish and waive its claim of right to locate and take its right of way through said city under the provisions of said Acts of Congress and upon the route of its line as surveyed and shown on its location map or maps and that in consideration thereof the said city and its citizens would purchase from the owners and would deliver to said railway company the title to a right of way through said city upon a different route for its line; that the plaintiff does not know whether said agreement was oral or in writing, and if in writing does not have and cannot obtain a copy thereof to attach hereto; and that said agreement was fully carried out and fully executed by the parties thereto and a right of way [fol. 80] across the real estate involved in this action was purchased from the said Naoma Noble and the same was conveyed to the said railway company by the deed Exhibit C to the plaintiffs' petition and the said railway company accepted said deed and changed the located route of its line so as to cross said real estate.

9. That they specifically deny that the said Choctaw Coal and Railway Company complied with the provisions of said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and aver that all and whatever right it ever had to take and use a right of way for its said road over and across the said real estate involved in this action became and was forfeited for non-compliance with the provisions of said Acts of Congress and had ceased to exist prior to the commencement of said condemnation proceedings above referred to and the purchase of the title conveyed by said deed, Exhibit C to plaintiffs' petition.

10. That they admit that upon the abandonment of said real estate by said Choctaw, Oklahoma and Gulf Railroad Company and said Chicago, Rock Island and Pacific Railway Company for a right of way and on December 4, 1930, the District Court of the United States for the Western District of Oklahoma made and entered its judgment and decree in said cause No. 1174—Equity in said Court, adjudging and decreeing that the said railroad companies had abandoned and forfeited all their right,

title and interest in and to the real estate therein described and including the real estate involved in this action, and [fol. 81] that a copy of said judgment and decree is attached as Exhibit G to the defendant's answer and cross petition herein.

11. That they aver that if the defendant, in appropriating and using the real estate involved in this action as and for a public park, as alleged in paragraph 4 of plaintiffs' petition and admitted in paragraph 4 (g) of its answer, without having purchased or attempted to purchase, and without having instituted condemnation proceedings against the plaintiffs' right and title thereto, or having compensated the plaintiffs in any way therefor, and without intending to do so, relies upon and justifies its action under the proviso found in Section 5505 of Compiled Oklahoma Statutes, 1921, which reads as follows, to wit:

"Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings;"

then that said statute, in so far as it provides or may be construed to provide that the defendant may occupy and remain in possession of said real estate before the compensation and damages to the plaintiffs therefor have [fol. 82] been ascertained and paid, is unconstitutional and void for that it contravenes Section 24 of Article 2 of the Constitution of the State of Oklahoma.

Wherefore, having fully replied to the answer and answered the cross petition of the defendant herein, the plaintiffs pray for judgment in their favor, as in their petition they have prayed.

(Signed) H. L. Goddard, Fred Ptak, and Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 83] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

CAPTION

Be it remembered: That on this 14th day of September, 1931, the same being a regular judicial day of the regular September Term, 1931, the above and foregoing cause coming regularly on for trial on its merits, pursuant to assignment duly made and had and published, and all parties being present by their respective counsel as above stated and all parties having announced ready for trial, and having agreed that said cause be tried by the Court, without the intervention of a jury, thereupon, the opening statement for and on behalf of the respective parties was made to the Court by respective counsel and thereafter the plaintiffs, to sustain the issues on their part, introduced the following evidence, in regular order, to-wit:

[fol. 84] **Statement of the Evidence**

Plaintiffs introduced a certified copy of the record from the General Land Office of the appointment and qualification of the original and subsequent members of Board No. 2 of Townsite Trustees under the Oklahoma Townsite Act of 1890, and of the entry by said Board on September 1, 1890, in the Land Office at Oklahoma City, of the southeast quarter of section 33, township 12 north, range 3 west of the Indian Meridian, as a townsite (C-M. 111-147).

In the entry application following the description of the land appears the following recital:

"Said tract was settled upon as a townsite April 22, 1889, after 12 o'clock noon, and has since been occupied by claimants thereof—who are citizens of the United States—for the purposes of trade and business" (C-M. 112).

Plaintiffs introduced a certified copy of the patent from the United States to Edgar N. Sweet, Levy E. Coe and David H. Hammons, as "Trustees of the townsite of Oklahoma City in the second county in Oklahoma Terri-
[fol. 85] tory in trust for the several use and benefit of the occupants of the townsite of Oklahoma City in said

County and Territory according to their respective interests." The patent recites that entry had been made under the appropriate Acts of Congress for the southeast quarter of section 33, in township 12 north, range 3 west of the Indian Meridian, in Oklahoma Territory, and that full payment had been made by said trustees therefor, and gives and grants to said trustees the said real estate in trust, and to their successors and assigns in trust, for the persons designated (C-M. 150-152). This patent appears in full at page 15, supra.

Plaintiffs introduced a certified copy of a townsite trustees deed to Naoma Noble, dated December 27, 1890, and conveying Lot 6 in Block 36 in Oklahoma City in the County and Territory of Oklahoma, as the same appears from the original plat and survey of said city as approved and filed by the trustees. The deed recites appointment and qualification of the trustees under the provisions of the Townsite Act, and that as such trustees they had entered the southeast quarter of said section 33, upon which the townsite was situated, in trust for the several use and benefit of the occupants thereof according to their respective interests, and had made survey of said townsite into lots, blocks, squares, streets and alleys, and had assessed upon each of the lot the sums of money contemplated by the Townsite Act, and that within the meaning of said Act said grantee was entitled to the lot and had paid the assessment thereon in the sum $3.75. It pur- [fol. 86] ports to grant, convey and confirm the lot to her, her heirs and assigns (C-M. 154-157). This deed appears in full at page 17, supra.

Plaintiffs introduced a certified copy of the right of way deed from Naoma Noble and George Noble, her husband, to the Choctaw Coal and Railway Company, dated March 28, 1891, and conveying 40 feet off the north end of Lot 6, in Block 36, in Oklahoma City, with the stipulation and proviso that the premises conveyed were to be used for railroad purposes and would revert to the grantors, their heirs or assigns, when they ceased to be so used. (C-M. 161). This deed appears in full at page 21, supra.

Plaintiffs introduced a copy certified by the General Land Office of the original plat and survey of the townsite of Oklahoma City, as made, approved and filed by the townsite trustees for said city (C-M. 164-165).

Plaintiffs introduced a certified copy of a certificate of public convenience and necessity issued by the Interstate Commerce Commission, dated April 9, 1928, and authorizing the Choctaw, Oklahoma and Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company to abandon a portion of their line of railroad in Oklahoma County, Oklahoma, as described in their application for such certificate (C-M. 172). It was stipulated between counsel that the portion of the line of railroad so authorized to be abandoned included the Noble lot (C-M. 171). This certificate appears in full at page 23, supra.

Plaintiffs introduced in evidence a deed from the Chicago, Rock Island & Pacific Railway Company and the Choctaw, [fol. 87] Oklahoma and Gulf Railroad Company to the City of Oklahoma City, dated December 4, 1928, by which the grantors conveyed and quit claimed to the grantee the north forty (40) feet of the Noble lot, together with many other lots and parts of lots (C-M. 174-184).

Plaintiffs introduced in evidence a decree of the United States District Court for the Western District of Oklahoma, in case No. 1174 in Equity, in which the City of Oklahoma City was complainant and the railroad companies last mentioned were defendants, dated December 5, 1930, and in which the Court found and adjudged that the defendants as owners, lessees and operators of the line of railway over the property described therein, in which was included the Noble lot, completely abandoned the same and surrendered possession thereof to the City of Oklahoma City, on December 4, 1930, and were without interest, right, title or equity in said property by reason of their abandonment thereof for railroad purposes, and that by virtue of the Act of Congress approved March 8, 1922 (42 Stat. 414; Title 43, Sec. 912, U. S. Code), all of the title and interest of the defendants to the property described was vested in the complainant and title thereto was quieted in it against all claims and demands of whatsoever nature of the defendants (C-M. 186-193). The plaintiffs were not parties to this action. A copy of this decree was attached as Exhibit G to defendant's Answer and appears in full at page 65, supra.

Plaintiffs introduced the oral testimony of plaintiff William Noble that he was the son of Naoma Noble and of

[fol. 88] George Noble, his co-plaintiff; that Naoma Noble died intestate on August 7, 1924; that he was an only child and that he and his father were her only heirs and her estate was never probated; and that she and her husband, George Noble, were the grantors in the right of way deed conveying the north 40 feet of said Lot 6 in Block 36 to the Choctaw Coal and Railway Company (C-M. 194-197).

It was stipulated by counsel that between December 4, 1930, when the defendant took possession of the lot in question, and the date of the commencement of the present action on January 6, 1931, there had been no improvements made or work done thereon (C-M. 197).

The plaintiffs rested their case.

[fol. 89] Defendant introduced in evidence the Act of Congress of February 18, 1888, 25 Stat. 35, authorizing the Choctaw Railway Company to construct a railway through the Indian Territory (C.M.-199-209); the Act of Congress of February 13, 1889, 25 Stat. 668, amending the Act of February 18, 1888, by authorizing the Choctaw Railway Company to construct a branch from a point on its main line in the Choctaw Nation to a point on the Santa Fe Railway in the northwest corner of the Territory (C.M. 210-212); the Act of Congress of February 21, 1891, 26 Stat. 765, extending to February 18, 1894, the time within which the Choctaw Railway Company was required to complete its road (C.M. 213-214); the Act of Congress of January 22, 1894, 28 Stat. 27, extending to February 18, 1896, the time within which the Choctaw Railway Company was required to complete its road (C.M. 215-217); and the Act of Congress of April 24, 1896, 29 Stat. 98, authorizing the Choctaw Railway Company to construct branches to its road in Indian Territory and declaring that the road already constructed was a full compliance by the company with the requirements of the Act applicable to it (C.M. 226-229). Copies of these Acts were attached as Exhibits A, B, C, D, and F, respectively, to defendants answer and appear in full herein beginning at pages 47, 57, 59, 60, and 62, respectively, supra.

Defendant introduced in evidence the Act of Congress of August 24, 1894, 28 Stat. 502, authorizing the purchasers of the property and franchise of the Choctaw Railway Cor-

pany, which had become insolvent, to organize a new cor-
[fol. 90] poration which should have all the powers, privileges and franchises of the old one (C.M. 218-225). A statement of the provisions of this Act was set out in paragraphs 7 and 8 of the defendant's answer and appears herein at pages 37-38, supra.

Defendant introduced in evidence an Act of Congress, passed April 28, 1904, validating certain conveyances of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company. Said Act was introduced to show that the United States Government claimed and held a proprietary interest in railroad rights of way, which had been granted by Congress. It is found in 33 Stat. at Large, p. 538 (C.M. 316-318).

Defendant introduced an Act of Congress, passed June 24, 1912, legalizing certain conveyances of rights of way made prior to that time, by the Union Pacific Railroad Company, commonly known as the Norris Act, and published in 37 Stat. 138 (C.M. 319-322).

Defendant introduced an Act of Congress, passed October 22, 1919, authorizing the Union Pacific Railroad Company to convey for public road purposes certain parts of its right of way. Said Act is published in 41 Stat. 304 (C.M. 323-325).

Defendant introduced an Act of Congress, passed May 25, 1920, authorizing all Railroad companies to which grants for right of way through public lands had been made by Congress, to convey a portion of such right of way to any state, city or municipality as a public highway or street. Said Act is published in 41 Stat. 621 (C.M. 326-327).

[fol. 91] Defendant introduced in evidence the Act of Congress of March 3, 1905, 33 Stats. 991, authorizing the Choctaw, Oklahoma and Gulf Railroad Company to sell its railway property, rights, privileges and franchises to the Chicago, Rock Island and Pacific Railway Company and authorizing the latter company to buy the same. Under this Act the former company leased all of its railway property, including its right of way over the land involved in these cases, to the latter company for a term of 999 years (C.M. 231-232).

Defendant introduced in evidence the Treaty between the Creek Indians and the United States of June 14, 1866,

14 Stats. 785, the material parts of which are as follows (C.M. 234-253):

Treaty With the Creek Indians. June 14, 1866

Treaty between the United States of America and the Creek Nation of Indians; Concluded June 14, 1866; Ratification advised, with Amendments, July 19, 1866; Amendments accepted July 23, 1866; Proclamated August 11, 1866

Andrew Johnson, President of the United States of America, to all and singular to whom these presents shall come, Greeting:

Whereas a treaty was made and concluded at the city of Washington in the District of Columbia, on the four- [fol. 92] teenth day of June, in the year of our Lord one thousand eight hundred and sixty-six, by and between Dennis N. Cooley and Elijah Sells, Commissioners, on the part of he United States, and Ok-ta-has Harjo, Cow-mikko, and Cotch-cho-chee, delegates at large of the Creek Nation of Indians, and D. N. McIntosh and James M. C. Smith, special delegates of the Southern Creeks, on the part of said Creek Nation of Indians and Southern Creeks, all of which delegates at large and special delegates were duly authorized thereto by said Creek Nation and Southern Creeks, which treaty is in the words and figures following to wit:

Treaty of Cession and Indemnity concluded at the city of Washington on the fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-six, by and between the United States, represented by Dennis N. Cooley, Commissioner of Indian affairs, Elijah Sells, superintendent of Indian affairs for the Southern superintendency, and Col. Ely S. Parker, special Commissioner, and the Creek Nation of Indians, represented by Ok-tars-sars-harjo, or Sands; Cow-e-to-me-co and Che-chu-chee, delegates at large, and D. N. McIntosh and James Smith, special delegates of the Southern Creeks.

Preamble

Whereas existing treaties between the United States and the Creek Nation have become insufficient to meet their

mutual necessities; and whereas the Creeks made a treaty [fol. 93] with the so-called confederate states, on the tenth day of July, one thousand eight hundred and sixty-one, whereby they ignored their allegiance to the United States, and unsettled the treaty relations existing between the Creeks and the United States, and did so render themselves liable to forfeit to the United States all benefits and advantages enjoyed by them in lands, annuities, protection, and immunities, including their lands and other property held by grant or gift from the United States; and whereas in view of said liabilities the United States require of the Creeks a portion of their land whereon to settle other Indians; and whereas a treaty of peace and amity was entered into between the United States and the Creeks and other tribes at Fort Smith, September tenth, eighteen hundred and sixty-five, whereby the Creeks revoked, cancelled, and repudiated the aforesaid treaty made with the so-called confederate states; and whereas the United States, through its commissioners, in said treaty of peace and amity, promised to enter into treaty with the Creeks to arrange and settle all questions relating to and growing out of said treaty with the so-called confederate states: Now, therefore, the United States, by its commissioners, and the above-named delegates of the Creek Nation, the day and year above mentioned, mutually stipulate and agree, on behalf of the respective parties, as follows, to wit:

[fol. 94] Article III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their land, estimated to contain three millions two hundred and fifty thousand five hundred and sixty acres, the United States agree to pay the sum of thirty (30) cents per acre, amounting to nine hundred and seventy-five thousand one hundred and sixty-eight dollars, in the manner hereinafter provided, to wit: two hundred thousand dol-

lars shall be paid per capita in money, unless otherwise directed by the President of the United States, upon the ratification of this treaty, to enable the Creeks to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining, and to pay the damages sustained by the mission schools on the north fork and the Arkansas rivers, not to exceed two thousand dollars, and to pay the delegates such per diem as the agent and Creek council may agree upon, as a just and fair compensation, all of which shall be distributed for that purpose [fol. 95] by the agent, with the advice of the Creek council, under the direction of the Secretary of the Interior. One hundred thousand dollars shall be paid to the soldiers that enlisted in the Federal army and the loyal refugee Indians and freedmen who were driven from their homes by the Rebel forces, to reimburse them in proportion to their respective losses; four hundred thousand dollars shall be paid per capita in money to said Creek nation, unless otherwise directed by the President of the United States, under the direction of the Secretary of the Interior, as the same may accrue from the sale of land to other Indians. The United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent per annum from the date of the ratification of this treaty, on the amount hereinbefore agreed upon for said ceded lands, after deducting the said two hundred thousand dollars; the residue, two hundred and seventy-five thousand one hundred and sixty-eight dollars, shall remain in the treasury of the United States, and the interest thereon, at the rate of five per centum per annum, be annually paid to said Creeks as above stipulated.

Article V. The Creek nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south [fol. 96] of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employes, shall be subject to the laws of the United States

relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek nation, lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such a price per acre as may be eventually agreed upon between said Creek nation and the party or parties building said road, subject to the approval of the President of the United States: Provided, however, That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by anyone not a citizen of the Creek nation, according to its laws and recognized useages: Provided, also, That officers, servants, and employes of said railroad necessary to its construction and management shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse law and such rules and regulations as may be established by the Secretary of the Interior, nor shall any conveyance of any of said lands be ma le to the party building and managing said [fol. 97] road until its completion as a first-class railroad, and its acceptance as such by the Secretary of the Interior.

Article XI. The stipulations of this treaty are to be full settlement of all claims of said Creek nation for damages and losses of every kind growing out of the late rebellion and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called confederate states; and the Creeks hereby ratify and confirm all such diversions of annunities heretofore made from the funds of the Creek nation by the United States, and the United States agree that no annunities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Creeks, to the use of refugee and destitute Indians other than the Creeks or members of the Creek nation after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

Article XII. The United States reaffirms and reassumes all obligations of treaty stipulations with the Creek nation entered into before the treaty of said Creek nation with

the so-called confederate states, July tenth, eighteen hundrd and sixty-one, not inconsistent herewith; and further agrees to renew all payments of annuities accruing by force of said treaty stipulations from and after the close [fol. 98] of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleventh.

Article XIII. A quantity of land not exceeding one hundred and sixty acres, to be selected according to legal subdivisions, in one body, and to include their improvements, is hereby granted to every religious society or denomination which has erected, or which with the consent of the Indians, may hereafter erect buildings within the Creek country for missionary or educational purposes; but no land thus granted nor the buildings which have been or may be erected thereon shall ever be sold or otherwise disposed of, except with the consent and approval of the Secretary of the Interior; and whenever any such lands or buildings shall be so sold or disposed of, the proceeds thereof shall be applied, under the direction of the Secretary of the Interior, to the support and maintenance of other similar establishments for the benefit of the Creeks and such other persons as may be or may hereafter become members of the tribe according to its laws, customs, and usages; and if at any time said improvements shall be abandoned for one year for missionary or educational purposes, all the rights herein granted for missionary and educational purposes shall revert to the said Creek nation.

Article XIV. It is further agreed that all treaties heretofore entered into between the United States and the Creek nation which are inconsistent with any of the articles [fol. 99] or provisions of this treaty shall be, and are hereby rescinded and annulled; and it is further agreed that ten thousand dollars shall be paid by the United States, or so much thereof as may be necessary, to pay the expenses incurred in negotiating the foregoing treaty.

In testimony whereof, we, the commissioners representing the United States and the delegates representing the Creek nation, have hereunto set our hands and seals at the place and on the day and year above written.

(The names of the signers of the treaty are omitted.)

Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the nineteenth of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty with the amendments as aforesaid.

In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this eleventh day of August, in the year of our Lord one thousand eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

Andrew Johnson.

By the President: Henry Stanbery, Acting Secretary of State.

[fol. 100] Defendant introduced in evidence the Treaty between the Creek Indians and the United States of January 19, 1889, 25 Stats. 757, the material parts of which are as follows (CM 253-262):

Chap. 317.—An Act to ratify and confirm an agreement with the Muscogee (or Creek) Nation of Indians in the Indian Territory, and for other purposes.

Whereas it is provided by section eight of the act of March third, eighteen hundred and eighty-five, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes", "that the President is hereby authorized to open negotiations with the Creeks, Seminoles, and Cherokees for the purpose of opening to settlement under the homestead laws the unassigned lands in said Indian Territory ceded by them respectively, to the United States by the several treaties of August eleventh, eighteen hundred and sixty-six. March twenty-first, eighteen hundred and sixty-six, and July nineteenth, eighteen hundred and sixty-six; and for that purpose the sum of five thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated, out of any money in the Treasury not otherwise appropriated; his action hereunder to be reported to Congress; and

Whereas William F. Vilas, Secretary of the Interior, by and under direction of the President of the United [fol. 101] States, on the part of the United States, and the Muscogee (or Creek) Nation of Indians, represented by Pleasant Porter, David M. Hodge, and Esparhecher, delegates and representatives thereto duly authorized and empowered by the principal chief and national council of the said Muscogee (or Creek) Nation, did, on the nineteenth day of January, anno Domini eighteen hundred and eighty-nine, enter into and conclude articles of cession and agreement, which said cession and agreement is in words as follows:

Articles of cession and agreement made and concluded at the city of Washington on the nineteenth day of January in the year of our Lord eighteen hundred and eighty-nine, by and between the United States of America, represented by William F. Vilas, Secretary of the Interior, by and under direction of the President of the United States, and the Muscogee (or Creek) Nation of Indians, represented by Pleasant Porter, David M. Hodge, and Esparhecher, delegates and representatives thereunto duly authorized and empowered by the principal chief and national council of the said Muscogee (or Creek) Nation.

Whereas by a treaty of cession made and concluded by and between the said parties on the fourteenth day of June, eighteen hundred and sixty-six, the said Muscogee (or Creek) Nation, in compliance with the desire of the United States to locate other Indians and freedmen thereon, ceded and conveyed to the United States, to be sold to and [fol. 102] used as homes for such other civilized Indians as the United States might choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south, which should be surveyed as provided in the eighth article of the said treaty; the eastern half of the lands of the said Muscogee (or Creek) Nation to be retained by them as a home;

And whereas but a portion of said lands so ceded for such use has been sold to Indians or assigned to their use, and the United States now desire that all of said ceded lands may be entirely freed from any limitation in respect to the use and enjoyment thereof and all claims of the said Muscogee (or Creek) Nation to such lands may be surrendered and extinguished as well as all other claims of whatsoever

nature to any territory except the aforesaid eastern half of their domain;

Now, therefore, these articles of cession and agreement by and between the said contracting parties, witness:

I. That said Muscogee (or Creek) Nation, in consideration of the sum of money hereafter mentioned, hereby absolutely cedes and grants to the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and [fol. 103] established under the said treaty of eighteen hundred and sixty-six, and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation.

II. In consideration whereof, and of the covenant herein otherwise contained, the United States agree to pay to the said Muscogee (or Creek) Nation the sum of two million two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents.

IV. These articles of cession and agreement shall be of no force or obligation upon either party until they shall be ratified and confirmed, first, by Act of the national council of said Muscogee (or Creek) Nation, and secondly, by the Congress of the United States, nor unless such ratification shall be on both sides made and completed before the first day of July, anno Domini eighteen hundred and eighty-nine.

Whereas the Muscogee (or Creek) Nation of Indians has accepted, ratified, and confirmed said articles of cession and agreement by act of its national council, approved by the principal chief of said nation on the thirty-first day of January, anno Domini eighteen hundred and eighty-nine, wherein it is provided that the grant and cession of land [fol. 104] and territory therein made shall take effect when the same shall be ratified and confirmed by the Congress of the United States of America, Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said articles of cession and agreement are hereby accepted, ratified, and confirmed.

Sec. 2. That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who ma[illegible] enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.

Sec. 3. That for the purpose of carrying out the terms of said articles of cession and agreement the sum of two million two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents is hereby appropriated.

[fol. 105] Sec. 4. That the Secretary of the Treasury is hereby authorized and directed to pay out of the appropriation hereby made, the sum of two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents to the national treasurer of said Muscogee (or Creek) Nation, or to such person as shall be duly authorized to receive the same, at such time and in such sums as shall be directed and required by the national council of said nation, and the Secretary of the Treasury is hereby further authorized and directed to place the remaining sum of two million dollars in the Treasury of the United States to the credit of said Muscogee (or Creek) Nation of Indians, to be held for, and as provided in said articles of cession and agreement, and to bear interest at the rate of five per centum per annum, from and after the first day of July, anno Domini eighteen hundred and eighty-nine; said interest to be paid to the treasurer of said nation annually. Approved March 1, 1889.

[fol. 106] Defendant introduced in evidence a certified copy of the Report from the Committee on the Judiciary of the House of Representatives, dated April 24, 1912, upon a bill to legalize certain conveyances theretofore made by the Union Pacific Railroad Company. The Report is as follows (CM 356-380):

House of Representatives, 62d Congress, 2d Session

Report No. 593

Legalizing Conveyances Made by Union Pacific Railway Co.

April 24, 1912—Referred to the House Calendar and Ordered to be Printed

Mr. Norris, from the Committee on the Judiciary, submitted the following Report (to accompany H. R. 16689):

The Committee on the Judiciary, to which was referred the bill (H. R. 16689) to legalize certain conveyances heretofore made by the Union Pacific Railroad Co. and its successors, having considered the same, report thereon with the recommendation that it pass with the following amendments:

First. Page 1, line 3, after the word "by", insert the following: "And all rights acquired by adverse possession against."

Second. Page 1, line 3, after the amendment just suggested, the word "the" before "Union" should begin with a capital letter.

[fol. 107] Third. Page 1, line 4, after the word "or", strike out the word "by".

Fourth. Page 1, line 5, the word "the" preceding the word "Union", should begin with a capital letter.

Fifth. Page 2, add a new section, as follows:

Sec. 2. That all conveyances, agreements, or acts heretofore made or done by, and all rights acquired by adverse possession against The Union Pacific Railroad Company, or the Union Pacific Railway Company, or The Denver Pacific Railway and Telegraph Company, or the successors or assigns of any of them, conveying any land forming a part of the right of way between Denver, Colorado, and

Cheyenne, Wyoming, of or by any of said companies under any act of Congress or defining the limits of said right of way or restricting the same, are hereby legalized, validated, and confirmed: Provided, That said conveyances, agreements, or acts shall not have the effect to diminish said right of way to a less width than fifty feet on each side of the center of said railroad as now established and maintained.

The necessity for this legislation is brought about on account of a dispute that has arisen within the last few years regarding the width of the right of way of the Unio Pacific Railroad Co. While the bill as introduced is general in its terms, the controversy exists principally along the said line of said railroad in the State of Nebraska and in Colorado on the line of said road running from Denver to Cheyenne. The railroad company claims that its right [fol. 108] of way is 400 feet wide, while the abutting owners in the State of Nebraska claim that the right of way through that State is only 200 feet wide, and as far as the controversy in that State is concerned it is this 100 feet on each side of the right of way that is in dispute. In the line running from Denver to Cheyenne, particularly where the road passes through the city of Greeley and some other towns and villages, while the railroad company is claiming a width of 400 feet for its right of way, the abutting property owners claim that said right of way is only 100 feet wide.

In order to understand the situation, it is necessary to review briefly, some of the history of congressional legislation as it applies to this railroad. The first legislation on the subject was an act of Congress, passed in 1862, providing for the organization of the Union Pacific Railroad. This act provided for the incorporation of the company and granted it certain public lands as a bonus. The act contains the following provision:

That the right of way through public lands be, and the same is hereby granted to the said company for the construction of said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations.

[fol. 109] Other parts of the act made various provisions for the filing of maps, etc., and for the definite location of the railroad, and contained provisions as to the time of commencing the construction of the road. The act was formally accepted by the company and the terms agreed to, but nothing was actually done by the company toward the construction of such road until after the passage of the act of 1864.

In 1864 Congress passed another act amending the act of 1862. The amendatory act, among other things, doubled the amount of land given the company as a bonus. The odd-numbered sections of land along said right of way were granted to the company. The even-numbered sections still remained public land and subject to entry under the various laws of the United States. Whatever was done by the railroad company in the way of accepting the provisions of the act of Congress, filing the maps of location, etc., was done after the passage of the act of 1864. The said amendatory act of 1864 contained, among other things, the following provisions:

And be it further enacted, That the Union Pacific Railroad Company and all other companies provided for in this act and the act of which this is amendatory be, and are hereby empowered to enter upon, purchase, take, and hold any land or premises that may be necessary and proper for the construction and working of said railroad, not ex-
[fol. 110] ceeding in width one hundred feet on each side of its center line unless a greater width be required for the purpose of excavation or embankments, and also any land or premises that may be necessary and proper for turnouts, standing places for cars, depots, station houses, or any other structures required in the construction and operation of the said road.

There is no doubt that upon a fair examination of the evidence and consideration of all the facts surrounding and relating to the building of this road and the settlement of the country adjoining it, and that for more than 40 years both the railroad company and the settlers along its line have acted upon the theory that the amendatory act of 1864 fixed the width of the right of way at 200 feet instead of 400 feet, and that the right of way was limited and fixed by the act of 1864, rather than by the act of 1862.

At the time of the passage of these acts, the land in Nebraska, over which this railroad was surveyed was almost without exception, Government land. After the railroad was built, however, the settlers took up the even-numbered sections under the homestead and preemption laws, and made settlements thereon, and in due time patents were issued by the Government to such settlers for such lands. The patents so issued by the Government to the settlers upon the even-numbered sections through which the railroad had been built, contained no reserva- [fol. 111] tion of the right of way and made no reference whatever, to the existence of said right of way over and across such lands, and so far as anything appears on the face of said patents, there is no reservation by the Government whatever, of any right of way. It is not claimed by any of the owners of these lands, that by virtue of such patents they acquired any title whatever to the right of way of the railroad.

It is admitted that notwithstanding the absence of any such reservation, the settlers acquired no title whatever, to any land properly included within the railroad right of way, and this fact is mentioned only for the purpose of showing that as far as the Government was concerned, in the issuing of its patents, it conveyed no notice whatever, to the settlers of the existence of a right of way 400 feet wide. The odd-numbered sections given as a bonus to the railroad company, were sold and conveyed to settlers, and with very few exceptions in the State of Nebraska, when the railroad company made such sale and issued either a contract for a deed or a deed to the land, a reservation was made of only 100 feet on each side of the center of the railroad. On the theory that the railroad right of way was 200 feet instead of 400, fences were built along such line both by the railroad company and by the settlers. The settlers who took up the even-numbered sections under the homestead and preemption laws, cultivated their land up to within 100 feet on each side of the railroad. There seemed [fol. 112] to be no dispute and no misunderstanding and this condition of things continued for about 40 years. As soon as the railroad company constructed its line of road, it laid out towns all along its line, on the odd-numbered sections which it owned and which had been deeded to it by the Government under the acts of Congress heretofore referred to. In laying out these towns, they were without

exception, laid out on the theory that the right of way of the railroad company was 200 feet instead of 400 feet. Upon this 100 feet which has since come into dispute, improvements were made and streets were laid out.

As a rule, in most of these new towns, the principal street ran parallel with the railroad and was improved by the usual improvements and buildings that would be constructed in growing villages and cities. Some of these towns have grown to be cities. In the city of Grand Island, Nebr., this street, known as Front Street, is located entirely on this 100-foot strip of disputed territory. It has for quite a number of years been a paved street and been so maintained by the city. For quite a number of blocks, the street is built up with modern buildings and occupied by business houses of various kinds. If this 100 feet were now taken by the railroad company as a part of its right of way it would leave all these buildings without any means of access except through an alley in the rear. All along the line of the railroad throughout this State, various kinds of improvements have been made. In the country, the land [fol. 113] for the most part is in a high state of cultivation and is worth from $75 to $150 an acre. Where the railroad company, on its odd-numbered sections, sold its land either to farmers or to purchasers of town lots, it has received pay for this 100-foot strip that is in dispute on each side of the line of the right of way. Where the even-numbered sections were taken by settlers and title acquired from the Government these settlers, in most instances, paid to the Government of the United States the sum of $2.50 per acre for all this disputed tract.

Until within a few years ago, no one had questioned the legality of the title of the individual proper- owners along the right of way. For 40 years lands in the country and lots in the villages and cities had been improved and transferred in the usual course of business, and taxes have been paid upon this disputed strip by such owners, on the theory that they had a perfect title. Within the last two years, however, the railroad company, both in Colorado and in Nebraska, have begun to assert their title and their right to the possession of the entire 400-foot strip, claiming that their title and right of possession is derived from the act of 1862, which fixed the right of way at 400 feet. Various

actions have been commenced in both States, to acquire possession of the disputed strip, and are now pending both in the State and United States courts. An examination of the authorities and the decisions of the Supreme Court will [fol. 114] I think lead to the conclusion that unless some legislation similar to that intended by this bill is enacted by Congress the railroad company will be successful in these suits and the titles of the property owners to this disputed strip will be annulled and set aside. In many instances, in cities and towns, it will mean the financial ruin of many people whose accumulations of nearly a lifetime will be lost, and all this will be brought about without any possible good or benefit to the railroad company.

The question was first directly passed upon by the Supreme Court of the United States in the case of the Northern Pacific Railway Co. v. Townsend (190 U. S. Repts. p. 267). The case arose under a statute, enacted by Congress, authorizing the construction of the Northern Pacific Railroad Co. It provided that the right of way of the railroad should be 400 feet. The defendant Townsend claimed a portion of the 400 feet by adverse possession, and if the title of the railroad company was such that title to any of its right of way could have been acquired by adverse possession, or could have been deeded away directly by the railroad company, then Townsend had acquired a perfect title. The Supreme Court, however, speaking through Mr. Justice White, now Chief Justice, held that the title of the railroad company to this right of way granted by the act of Congress was such that it had no right to dispose of any of said right of way; that it could not give a valid title and had no authority to convey to any person, any part of [fol. 115] said right of way, and that therefore no title against the railroad company to any portion of its right of way could be acquired by adverse possession. In passing on this case Mr. Justice White, representing the majority of the court, used the following language:

Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the

perpetual use of the land for the legitimate purpose of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done [fol. 116] directly, for, as said in Grand Trunk Railroad v. Richardson (91 U. S., 454, 468), "a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in Northern Pacific Railroad Co. v. Smith (171 U. S. 275), speaking of the very grant under consideration: "By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, [fol. 117] its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way can not be treated without overthrowing the act of Congress as forming the basis of an adverse

possession which may ripen into a title good as against the railroad company.

The question at once presents itself: What will be the legal effect if we pass the proposed bill? There can be no question but what the enactment of this proposed legislation will give entire relief and will have the effect of validating conveyances made by the railroad company, within the limits specified in the bill.

This will be true whether such conveyances were made directly by deed from the railroad company, or whether title against the railroad company was acquired by adverse possession under the law of the State where the land is situated. A condition exactly similar to this existed in the case of the Northern Pacific Railway Co. v. Ely et al. (197 U. S. Repts., p. 1). This action was one to quiet title, brought by the Northern Pacific Railway Co., against various persons claiming ownership. The defendants in that case had acquired their land through patents issued by the United States, under the preemption and homestead laws, and had been in quiet, peaceful, undisturbed, and undisputed possession thereof for more than 10 years prior to the commencement of the action, and were claiming title by adverse possession under the laws of the State of Wash-
[fol. 118] ington.

It was admitted by the defendants in the case that the act of Congress of 1864 gave to the railroad company a right of way of 400 feet in width, and the only question involved was whether it was possible for private parties to obtain title to a portion of this right of way by adverse possession. The Supreme Court of the State of Washington held in that case that the statute of limitations did run against the railroad company and that the title acquired by the defendants had become absolute. Shortly after this, the Supreme Court of the United States rendered the decision in the case of the Northern Pacific Railway Company v. Townsend, holding, as we have heretofore seen, that title could not be thus acquired by adverse possession to any portion of the right of way, and within a month after the Supreme Court had rendered this decision in the Townsend case, the railway company, by writ of error, took the Ely case into the Supreme Court of the United States, and the same was docketed there on the 23rd day of July, 1903.

While this case was pending in the Supreme Court of the United States, Congress passed the act of April 28, 1904, for the express purpose of remedying the wrong that would have necessarily come about by an affirmance of the Ely case, and which it was apparent, would necessarily have to be done if the Supreme Court followed their decision in the Townsend case. Section 1 of the act of April 28, 1904, is practically the same as section 1 of the bill now under [fol. 119] consideration. That section reads as follows:

That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by an act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

It will be noticed that the remedial legislation in that case was passed while the question was pending in the courts. The facts in that case were very nearly identical with the facts in this case. The legislation in that case was practically identical with the bill in this case. It will be seen, therefore, that the decision in Northern Pacific Railway Company v. Ely was upon a state of facts and a condition of law which would be practically identical with existing conditions if the present bill were enacted into law. It is important to note, therefore, that in the Ely case the Supreme Court of the United States, while still adhering to its decision in the Townsend case, gave full effect to the remedial legislation provided in the act of April 28, 1904, above quoted. The decision was rendered on the 20th day of February, 1905, and the first paragraph [fol. 120] of the syllabus reads as follows:

Northern Pacific Railway Company v. Townsend (190 U. S., 267) affirmed as to that point individuals can not for private purposes acquire by adverse possession under a State statute of limitations any portion of the right of way granted to the Northern Pacific Railway Co. But by the act of April 28, 1904, that right of way was narrowed to

200 feet in width and the title acquired to land outside of a strip of that width was confirmed.

Further on in the opinion, the court uses the following language:

The act of April 28, 1904, in view of our decision in that case (Townsend case) was obviously intended to and did have the effect to narrow the right of way to 200 feet in width, so far, at least, as outside of that strip the original right of way had been parted with.

After reviewing the authorities on the question of adverse possession the court sums up the argument as follows:

"Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the Supreme Court, had acquired title to their parcels by adverse possession and occupied the [fol. 121] same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm. The act is remedial and to be construed accordingly.

There can be no doubt, therefore, that the passage of this bill would have the effect of validating and confirming all the titles within the 400 strip; but outside of the 200 strip, that have been acquired both by direct deed from the railroad company in the case of the odd-numbered sections and by adverse possession in the case of the even-numbered sections, where the settlers have obtained title by patent from the United States.

The Colorado situation presents even greater equities in favor of this legislation than is presented by the facts relating to the controversy in Nebraska. The roadbed from Denver, Colo., to Cheyenne, Wyo., was originally graded and built by a local company, known as the Denver Pacific Railway & Telegraph Co. This was done during the years 1868 and 1869. By the act of Congress approved March 3, 1869, a connection was provided for this company and the Union Pacific Railway Co., and land subsidies were given

to the Denver Co. along the line between Denver and Cheyenne, as provided by prior acts of Congress.

Under this act, and after its approval, an agreement was entered into whereby the line from Denver to Cheyenne was built over the roadbed which had been graded in 1868 [fol. 122] and 1869. In 1870, Horace Greeley organized the Union Colony under the laws of Colorado, and acting on behalf of said colony, Mr. Greeley purchased a large amount of land and laid out the town of Greeley, in Colorado. This was on the line of the railroad running from Denver to Cheyenne. The title to the land upon which Greeley is situated, with the exception of one 40-acre tract, had been acquired from persons who had taken the same under the preemption laws of the United States. These entries were all filed prior to the building of this railroad and prior to the passage of the act of 1869. There was a dispute between the Union Land Co., represented by Horace Greeley, and the railroad company, as to the width of the right of way of the railroad company through the town of Greeley. After some negotiations between the officials of the road and the colony company an agreement was reached satisfactory to both parties. This agreement was incorporated in a deed of conveyance from the colony company to the railway company. The deed was dated on the 21st day of October, 1870, and was delivered by the colony company to the railroad company, and on the 1st day of November, 1870, the railroad company placed the deed on record. This deed is as follows:

Union Colony Right of Way Deed

Right of Way from Union Colony of Colorado to Denver Pacific Railway & Telegraph Co. Filed for Record at 11 o'clock November 1, 1870. W. J. Kram, Recorder

[fol. 123] Whereas the line or tract of the Denver Pacific Railway & Telegraph Co. runs through the lands of the Union Colony of Colorado and within the town plat of Greeley, Weld County, Colorado Territory, and an agreement has been made between the said Union Colony of Colorado and the Denver Pacific Railway & Telegraph Co. by which the said Union Colony of Colorado has agreed to grant to the Denver Pacific Railway & Telegraph Co.,

being the owner of said lands, a right of way in and over the same.

Now, therefore, know all men by these presents: That the said Union Colony of Colorado, in pursuance of the said agreement and in consideration of the sum of $1. paid to the said Union Colony of Colorado, do hereby give, grant, sell, and convey unto the said Denver Pacific Railway & Telegraph Co. a right of way of 50 feet on each side from the center of the line or track of said Denver Pacific Railway & Telegraph Co., in and over and running through said town plat of Greeley aforesaid on the east side thereof and along the said line of said railway, the said strip of land or right of way being of the width of 100 feet, and commencing at the southeast corner of said town plat of Greeley and running north through the following blocks: 101, 100, 82, 79, 62, 39, 22, 19 and 21 as platted and recorded in the office of the clerk of Weld County, and the said right of way shall be forever of the said dimensions. Also the said Union Colony of Colorado does hereby give, grant, sell, and convey unto the said Denver Pacific Railway & [fol. 124] Telegraph Co., a right of way of 200 feet along the line or track of the said Denver Pacific Railway & Telegraph Co. and within the blocks Nos. 42 and 59, in the town of Greeley, as platted and recorded in the office of the recorder of Weld County, said right of way commencing at the corner of the line or track of the said Denver Pacific Railway & Telegraph Co. and extending 150 feet to the east side and 50 feet to the west side thereof. The said Union Colony of Colorado agrees to lay out and construct along and east of said right of way a street 66 feet wide running north and south and within the blocks Nos. 42 and 59 aforesaid, and the said right of way shall be forever of the said dimensions.

In further consideration it is expressly agreed between the parties hereto that the said Denver Pacific Railway & Telegraph Co. shall erect within three months from the date of this instrument a good and substantial building for a freight and passenger depot at or near the point of said right of way where the said railway crosses Main Street, in the town of Greeley aforesaid, being on the north side of and along said Main Street.

It is also agreed in further consideration between the parties aforesaid that the said Denver Pacific Railway &

Telegraph Co. shall have for its use and benefit only the said right of way without any right or powers to give, grant, sell, convey, or rent the same. It is also agreed that intoxicating liquors shall never be manufactured, sold, or [fol. 125] given away in or upon said premises herein conveyed with the knowledge or consent of said Denver Pacific Railway & Telegraph Co., and in case any one of these conditions shall be violated this conveyance and everything herein contained shall be null and void.

To have and to hold the said easements and privileges to the said Denver Pacific Railway & Telegraph Co. forever as appurtenances to the said railway as above described.

In witness whereof the party of the first part has affixed its corporate seal and caused the same to be signed by N. C. Meeker, its agent and attorney in fact, this 21st day of October, A. D. 1870.

N. C. Meeker, President. (Corporate Seal.)

Signed and sealed in presence of F. M. Babcock.

(United States revenue stamp, 50 cents.)

Territory of Colorado,
Weld County, ss:

I, Frank M. Babcock, do hereby certify that on the 21st day of October, A. D. 1870, N. C. Meeker, President and attorney in fact for the Union Colony of Colorado, came before me, a notary public in the county aforesaid, and personally acknowledged that he had executed the within conveyance, and that I know the said N. C. Meeker to be the same person who executed the said conveyance.

[fol. 126] Given under my hand and notarial seal the day and year last above written.

Frank M. Babcock, Notary Public for Weld County.
(Notarial Seal.)

It will be observed that this deed provides for a right of way through the town of Greeley of 100 feet in width, and no more, except in blocks 42 and 59, through which blocks the right of way was 200 feet in width. In accordance with the provisions contained in the deed the colony company laid out and constructed the street provided for in said deed, and replatted its town, so as to correspond with the

necessary changes made, and the railroad company immediately constructed its depot and, except in the business centers, fenced its right of way through the town, placing the fence on each side of the railroad 50 feet from the center thereof. The town of Greeley has grown to be a city of about 10,000 people. The Union Colony Co., as soon as the deed had been recorded and the streets rearranged in accordance therewith, began the sale of lots on each side of said railroad, and parties to whom said sales were made took possession of the property and began the erection of improvements thereon. Some of said improvements are of very great value and consist in warehouses, mills and factories, all of a permanent character. The owners of this property have ever since 1870, continued to exercise undisputed possession and ownership of said [fol. 127] property, without any objection on the part of the railway company or any other person. They have paid all the taxes thereon, both general and special, assessed against said lots. Many of these lots have been frequently sold and conveyed and deeds of general warranty given. Many of them have been sold from 8 to 10 times and some of them as many as 25 times. Many of them have been mortgaged.

In the aggregate, there have been more than 1000 deeds of conveyance placed on record from various persons to the property abutting on this right of way within the limits of the city of Greeley. In the year 1909 the railroad company claimed to be the owner of a right of way 400 feet in width, throughout the entire length of the city, claiming that the same was granted to the company by the act of Congress before referred to. In many cases, mills and factories have been built on the disputed land and mortgaged. As soon as the question of title was placed in doubt by the action of the railway company, it was impossible to renew mortgages or to make sales of property. On this disputed tract, there is one mill that the evidence shows is worth more than $100,000. On some of the property, foreclosures of mortgages have been commenced because the owners are absolutely unable to renew loans or negotiate new ones. In December, 1909, the railroad company filed its bill of complaint against various defendants to quiet title in that company to a strip of land 400 feet wide, extending through the city of Greeley a distance of 2.2

[fol. 128] miles, and this case is now pending in the United States courts. An appeal to the circuit court of appeals of the eighth district was tried on June 21, 1911, the opinion being found in 189 Fed., page 1.

Each of the judges upon deciding this case, rendered a separate opinion. One judge held that in so far as any portion of the railroad company's 400-foot strip had been appropriated either by the city of Greeley for streets or alleys or by other railroad companies for the location of their lines, the Union Pacific Co. was precluded from recovering the land so appropriated, but that it was entitled to recover from all private owners who owned property within the disputed strip. Another one of the judges held that the Union Pacific Co. had no title to any land outside of the 100-foot right of way and was bound by the deed heretofore set out. The other judge held flatly that the Union Pacific Railway Co. was entitled to a right of way of 400 feet; that under the case of the Northern Pacific Railway Co. v. Townsend it was not bound by its deed or its agreement and no title could be acquired against it by adverse possession. The reasoning of the majority of this court therefore seems to be that at least as far as private individuals in Greeley are concerned, their titles to this disputed strip derived from the Union Colony Co. are invalid and that they are trespassers upon the right of way of the railroad company. This case has been taken on appeal to the Supreme Court of the United States and is [fol. 129] now pending therein.

Conditions similar to those at Greeley prevail at other places along the line between Denver and Cheyenne. In the town of Brighton, located on said railroad, there have been several suits commenced to recover lots within the 400-foot strip, where the lots have been in the possession of private parties for more than 40 years. In this town, there are several stores and warehouses and one hotel involved in the controversy. In this particular town the right of way was fixed in 1870, by agreement, at 75 feet on each side of the center of the track. Similar conditions exist in the country along this line of road to the conditions in the State of Nebraska.

It seems plain that these conditions demand relief at the hands of Congress, similar to that given the property owners in the Northern Pacific case. The equities are all

against the railroad company. It ought not to be allowed, after a period of 40 years, to violate its solemn obligations or to deprive men of property and property rights which they have honestly and fairly acquired. The bill, if passed, will not take from the railroad company one foot of land that it has not by its own act either directly or indirectly deeded away. The proposed legislation only gives validity to acts that the railroad company has heretofore done. It would only prevent it from refusing to be bound by its own action. There can be no successful claim made that the railroad company needs a right of way 400 feet in width. [fol. 130] It is a wider strip than is allowed under the statutes of any State in the Union. It is impossible to conceive that the time will ever come when the railroad company will need this much of a right of way. It has never used it in the past. It is not pretending to use it for railroad purposes now. Under its charter, it cannot use it for anything except for railroad purposes. At the hearing, the attorney representing the railroad company claimed that they would be able to use this 400-foot strip through the country for the purpose of plowing fire guards thereon and that they ought to be permitted to retain it all so as to have sufficient right of way upon which to build additional tracks, if the business should ever develop sufficiently to warrant it.

No one can conceive that the time will ever come when this railroad will need 400 feet upon which to build additional tracks for the transaction of its business and it is hardly reasonable to believe that the railroad company wants or that it ought to have this wide strip of territory simply for the purpose of plowing fireguards. At least, it could not expect to plow fireguards through the cities and towns where the claim is being made for a 400-foot right of way. Wherever it has maintained its right of way and used it, this bill will not interfere with such usage. No one can claim that the railroad company would in any way be injured by this legislation. It cannot possibly use the land. This wide strip would be of no possible benefit to [fol. 131] it. It could not dispose of it. It could not use it for manufacturing purposes, but under its charter, would be compelled to use it entirely for railroad purposes. It can not, therefore, be injured by the legislation. The lack of the legislation, however, is injuring thousands of people

and divesting them of many years of their labor. Neither is it any answer for the railroad company to say that in exceptional cases it does not intend to commence action against property owners. The very fact that the title is not valid interferes with business and destroys the value of the property. By no act of the railroad company can the title be made valid. It will take an act of Congress to do this. It is believed the bill in question will accomplish this purpose. Its effect will simply be to validate the acts of the railroad company and to give legal effect to the action heretofore taken by the railroad company.

[fol. 132] Defendant introduced in evidence a certified copy of the Report from the Committee on Public Lands to the House of Representatives, dated March 28, 1916, upon a bill granting a patent to a certain strip of land to Elisha A. Crandall. The report is as follows (CM 383-386):

House of Representatives, 64th Congress, 1st Session

Report No. 444

Granting Patent to a Certain Strip of Land to Elisha A. Crandall

March 28, 1916—Committed to the Committee of the Whole House and Ordered to be Printed

Mr. Smith of Idaho, from the Committee on Public Lands, submitted the following report (to accompany H. R. 7419):

The Committee on Public Lands, to whom was referred the bill (H. R. 7419) granting a patent to a certain strip of land to Elisha A. Crandall, having carefully considered the same, report herewith, and recommend that the bill do pass.

The purpose of the bill is to confirm title to Elisha A. Crandall, to whim was issued a patent October 16, 1903, a portion of which embraced land formerly granted as a right of way to the Northern Pacific Railroad Co. (now Railway Co.), but which has since been abandoned by said corporation. The report of the Secretary of the Interior, [fol. 133] hereto attached, more fully explains the merits of the proposed legislation.

Department of the Interior

Washington, March 4, 1916.

Hon. Scott Ferris,
Chairman Committee on Public Lands,
House of Representatives.

My Dear Mr. Ferris: In response to your request therefor, I have the honor to report on H. R. 7419 as follows:

The bill proposes to direct the Secretary of the Interior to issue a patent to Elisha A. Crandall for a strip of land formerly occupied by the Northern Pacific Railway Co. as a right of way, embraced within the homestead entry of Crandall, covering the E-½ SW.¼ and lots 6 and 7, sec. 6, T. 56 N., R 2 E., Boise meridian, Idaho, which strip of land has been abandoned by the said railway company.

This bill is the same as H. R. 21476, introduced in the Sixty-third Congress, third session, upon which no report was made owing to the adjournment of Congress March 4, 1915, before the same was completed.

The act of Congress approved July 2, 1844 (13 Stat., 365), made a grant to the Northern Pacific Railroad (now Railway) Co. of a right of way over the public lands to the extent of 400 feet in width along and upon such line as the company might adopt. Crandall made his entry January 27, 1899, and patent was issued to him October 16, 1903. He was charged with and received patent for the entire [fol. 134] acreage covered by the subdivisions described in his entry, notwithstanding that it appears that a part thereof had been granted to the railway company for right of way purposes. This was in accordance with the practice which has prevailed in this department for many years, under the belief that whatever reversionary interest the United States might have in the land granted to the railway company would pass to the owner under the patent issued to a subsequent entryman, in the event that such right of way should be abandoned.

In the case of Northern Pacific Railroad Co. v. Townsend (190 U. S., 367), it was held by the court in construing the above right of way:

"In effect, the grant was of a limited fee made on an implied condition of reverter, in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In a letter addressed to said Elisha A. Crandall, February 13, 1915, (43 Land Decisions, p. 556), it was held by this department that the patent granted to him on October 16, 1903, conveyed no interest or estate in the lands granted to and possessed by the railway company prior to the date on which his homestead entry was initiated, and that upon the abandonment by the railway company of the right of way granted to it across the lands described in the patent which afterwards issued to him, the legal title to the lands in such right of way reverted to and became the property [fol. 135] of the United States, and must so remain until some provision of statute has been made by Congress for its disposition.

The entire subject of the disposition to be made of abandoned portions of rights of way and easements which have reverted to the United States under circumstances similiar to that in the case under consideration, not only under the acts making right of way and land grants similar to that of the Northern Pacific Railway Co., but under the general railroad right of way act of March 3, 1875 (18 Stat., 482), has this day been made the subject of such recommendation to Congress as, in the opinion of this department, is best designed to secure the title to the lands included in such abandoned rights of way and easements in the parties entitled thereto under such patents or other evidences or title as may be issued by the United States for the legal subdivisions traversed or affected thereby.

However, if Congress sees fit to enact House bill 7419, for the relief of Mr. Crandall, this department has no objection to interpose to such action.

Cordially, yours, Franklin K. Lane, Secretary.

Defendant introduced in evidence a certified copy of a Report from the Committee on Public Lands to the Senate, dated July 7, 1916, upon the House bill granting a patent to [fol. 136] a certain strip of land to Elisha A. Crandall. This is the same bill to which the House Committee Report set out on pages 132 supra relates, and the Senate Committee Report merely adopts the House Committee Report and recommends the passage of the bill (CM 387-390).

[fol. 137] Defendant introduced in evidence a certified copy of a letter, dated March 4, 1916, from Franklin K. Lane, Secretary of the Interior, to Scott Ferris, Chairman

of the Committee on Public Lands of the House of Representatives. The letter is as follows (CM 348-353):

Department of the Interior

Washington, March 4, 1916.

Hon. Scott Ferris, Chairman,
Committee on Public Lands,
House of Representatives.

My dear Mr. Ferris: By the act of Congress approved July 2, 1864, (13 Stat., 365), making a grant of lands to the Northern Pacific Railroad Company, a right of way over the public lands four hundred feet in width along and upon the line of road as constructed by the company, was also granted. By other acts making grants of land to aid in the construction of railroads, rights-of-way of varying widths were also granted, some of them not exceeding two hundred feet in width.

In the construction of these grants of rights-of-way of the courts, the estate granted was characterized as a limited fee determinable by the act of the company in abandoning the property and ceasing to use it for the purpose for which the grant was made. In the case of the Northern Pacific Railroad Company v. Townsend, (190 U. S. 267, [fol. 138] the court held:

(Stamped on bottom of 1st page:) Dept. of the Interior. Received Feb. 29, 1913. To Solicitor. Sec'y of Mails. and Files. Copy for Secretary's office. Initial here. To Secretary 2-29-16, for signature.)

"In effect the grant was of a limited fee made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In another place in the same opinion, in construing the effect of such right-of-way upon a patent subsequently granted to a homestead entryman, it was held:

"As the grant of the right-of-way, the filing of the map of definite location, and the construction of the railroad within the quarter-section in question, preceded the filing of the homestead entries on such section, the lands form-

ing a right-of-way were taken out of the catagory of public lands, subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right-of-way, because of the fact that the grant to them was of the full legal subdivisions."

[fol. 139] In a letter dated February 13, 1915 (43 Land Decisions, page 556), addressed to Mr. E. A. Crandall, Hope, Idaho, in construing the effect of the four-hundred-foot right-of-way granted to the Northern Pacific Railroad Company by said act of July 2, 1864, upon the title issued to Mr. Crandall by patent dated October 16, 1903, upon his homestead entry allowed for lands traversed by such right-of-way, it was held:

"That upon abandonment by the railroad company of the right-of-way granted to it across the land described in the patent which afterward issued to you, the legal title to the lands of such right-of-way, reverted to and became the property of the United States, and must so remain until some provision of statute has been made by Congress for its disposition."

By Sec. 1 of the act of March 3, 1875 (18 Stat., 482), the right of way through the public lands of the United States was granted to railroad companies organized as therein set forth, and which complied with certain designated requirements "to the extent of one hundred feet on each side of the central line of said road" and also ground adjacent to such right-of-way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, "not to exceed in amount twenty acres for each station, to [fol. 140] the extent of one station for each ten miles of its road."

By Sec. 4 of said act it is further provided that upon the approval of the map or profile of the line of any such railroad by the Secretary of the Interior, the same shall be noted on the plats in the local land office and thereafter all such lands over which the right-of-way shall pass shall be disposed of subject to such right-of-way.

It is to be noted that the grant made by said act of

March 3, 1875, is spoken of throughout as a "right-of-way." The railroad company does not assure a full and complete title to the land on which the right-of-way is located but obtains only the right to use the land for the purposes for which it is granted and no other, and may hold such possession, if it is necessary to that use, as long and only as long as the use continues. The United States conveys the fee simple title in the land over which the right-of-way is granted by patent and the patentee takes the fee, for the full area of the subdivision subject *subject* to the railroad company's right of use and possession.

The character of the grant by said act of March 3, 1875, has recently been construed by the Supreme Court of the United States in its decision dated November 1, 1915, in the case of Rio Grande Western Railway Company v. Thomas B. Stringham et al., (30 Supreme Court Reports, 5). After referring to the fact that the grant made by the act is characterized as a "right-of-way" and that the act declares that "all such lands over which such right-of-way [fol. 141] shall pass shall be disposed of subject to such right-of-way", the Court decides as follows:

"The right-of-way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

Citing New Mexico v. United States Trust Company, 172 U. S. 171, 183; Northern Pacific Railroad Company v. Townsend, 190 U. S., 267, 271; United States v. Michigan, 190 U. S., 379, and Western Union Telegraph Company v. Pennsylvania Railroad Company, 195 U. S., 540, 570.

It follows, as a result of this ruling of the court, that, upon the abandonment by any railroad company of any right-of-way granted to it under said act of March 3, 1875, the legal title to the land included in such right-of-way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession. As determined by the Department in the Crandall case, supra, with reference to the Northern Pacific grant by act

of July 2, 1864, it must so remain until some provision of [fol. 142] statute is made by Congress for its disposition.

It is desirable, therefore, in cases where patent has been or any hereafter be issued by the United States for subdivisions of the public lands traversed or affected by a right-of-way granted to a railroad company as hereinbefore set forth, that legislation be enacted so that, in the event that any such railroad company ceases to use or retain the land for the purposes for which it was granted, such abandonment or non-user, would have the effect instantly to invest the patentee of the United States with the title to the lands covered by such right-of-way which has reverted to the United States by reason of the fact that the company no longer retains or uses the lands covered thereby for the purpose for which they were granted.

I have, therefore, prepared a bill, providing for the disposition of the abandoned portions of such rights-of-way in the manner hereinbefore suggested, a copy of which is attached hereto, and would urgently recommend the passage thereof.

Cordially yours, (Signed) Franklin K. Lane, Secretary.

[fol. 143] Defendant introduced in evidence a certified copy of the Report of the Committee on Public Lands to the House of Representatives, dated June 23, 1921, on a bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies. The Report is as follows (CM 393-397):

House of Representatives, 67th Congress, 1st Session

Report No. 217

Abandoned Portions of Rights of Way Granted to Railroad Companies

June 23, 1921—Committed to the Committee of the Whole House on the State of the Union and Ordered to be Printed

Mr. Burtness, from the Committee on the Public Lands, submitted the following report (to accompany H.R. 244):

The Committee on the Public Lands, to whom was referred the bill (H.R. 244) to provide for the disposition of

abandoned portions of rights of way granted to railroad companies, report same to the House with a recommenda- [fol. 144] tion that the following amendments be agreed to and that as so amended the bill do pass:

Page 2, line 1, after the word "lands", insert the following: "except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree of forfeiture or abandonment."

Page 2, line 14, change the word "or" to "of".

Page 2, line 16, strike out the period at the end of the line and insert in lieu thereof a semicolon, and add the following: "nor shall this act affect any public highway now on said right of way."

The object of this bill is to provide for disposition of lands embraced in forfeited or abandoned railroad rights of way on what was originally public lands. In some cases a right of way was granted by the Government and later forfeited, while in other cases change in the location of the railroad resulted in the abandonment of the old right of way. The act of March 3, 1875, under which most of the rights of way over public lands have been granted contains a provision for forfeiture of the grant for failure to construct the railroad within a specified time succeeding the date of the grant. Under the decision of the courts railroad companies receiving such grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for the purposes for which they were [fol. 145] granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes the property of the United States.

It is, however, a fact that in making conveyances of subdivisions traversed by such rights of way the United States issues patents for the full area of the tracts or legal subdivisions, making no diminution by reason of the prior grant of the right of way.

It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in the rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision has been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent. The attention of the committee was called, however, to the fact that in some cases highways have been established on

abandoned rights of ways or that it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in the establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right of way.

Where the forfeited or abandoned right of way which [fol. 146] would otherwise revert to the United States lies within the limits of a city or village, then the bill provides that title thereto shall vest in such municipality, subject of course to the same provisions as to roads applicable to rural lands.

There is attached to and made a part of this report the letter of E. C. Finney, Acting Secretary of the Interior, to the chairman of the committee, dated June 9, 1921.

Department of the Interior

Washington, June 9, 1921.

Hon. N. J. Sinnott,
Chairman Committee on the Public Lands,
House of Representatives.

My dear Mr. Sinnott: Receipt is acknowledged of your letter dated May 28, 1921, requesting a report on House bill 244, with which you submit a copy of House Report No. 851, Sixty-sixth Congress, second session, concerning House Bill 9899.

The bill submitted by you entitled "A bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies" provides that where rights of way of the character referred to granted to railroad companies have ceased or shall thereafter cease to be used for [fol. 147] the purposes granted whether by forfeiture or by abandonment declared or decreed by a court of competent jurisdiction or by act of Congress, such abandoned right of way shall then go to the owner of the subdivision in which the same is located, except that in the municipalities the right of way shall go to such municipality.

This bill is similar in its object and provisions to said

H. R. 9699, Sixty-sixth Congress, second session, upon which a report was made on December 4, 1919, in which the proposed legislation was favored, but certain changes and amendments were suggested in the proposed bill. This report is embodied in said House Report No. 851 submitted by you. The proposed legislation, H. R. 244, includes the amendments suggested in said department report.

Under the prevailing decisions of the courts the railroad companies to which grants of rights of way have been made of the character under consideration take a base or qualified fee with an implied condition of reverter in the event that the companies cease to use the land for the purposes for which it is granted (Northern Pacific Railroad Co. v. Townsend, 190 U. S., 267, 271; Rio Grande Western Railroad Co. v. Stringham, 239 U. S., 44). In making conveyances of the subdivisions traversed by such rights of way, however, the United States issues patents for the full area of the tracts, no diminution of acreage being made by reason of the prior grant of the right of way. It follows as the result of the [fol. 148] rulings above cited that upon the abandonment by any railroad company of any right of way any portion of any right of way granted to it the legal title to the land included in such right of way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession.

The legislation proposed by this bill, therefore, would seem to be desirable, and I would recommend the enactment thereof.

The report submitted by you is herewith returned.

Respectfully, E. C. Finney, Acting Secretary.

[fol. 149] Defendant introduced in evidence a certified copy of the Report of the Committee on Public Lands to the Senate, dated January 6, 1922, upon the House bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies. This is the same bill to which the House Committee Report set out at pages 143 fl. supra relates, and the Senate Committee Report merely adopts the House Committee Report and recommends the passage of the bill (CM 399-404).

[fol. 150] Defendant introduced in evidence the Act of Congress of March 8, 1922, 42 Stats. 414, which is as follows (CM 264-265):

42 Stats. 414. Chap. 94. (H.R. 244).—An Act to provide for the disposition of abandoned portions of rights of way granted to railroad companies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of such decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein pro-
[fol. 151] vided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever;

Provided, that this Act shall not affect conveyances made by any railroad company or portions of its right of way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right of way; Provided Further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

Approved, March 8, 1922.

[fol. 152] Defendant introduced in evidence as Exhibit 12 a letter from the Commissioner of the General Land Office with correspondence and map attached. The letter, dated Nov. 12, 1928, relates to proof and approval of the construction by the Choctaw Railway Company in conformity to the applicable Acts of Congress of that part of its line extending from Oklahoma City to Ft. Reno as shown on its map of location filed July 13, 1889. The letter is as follows:

[fol. 153] EXHIBIT 12

Address only the Commissioner of the General Land Office

United States Department of the Interior

General Land Office, Washington

Nov. 12, 1928.

In reply please refer to: Guthrie 013958 "F" JKR.

Choctaw Coal & Railway Company, Choctaw, Oklahoma & Gulf Railway Company, Successors. Proof of Construction Accepted.

Messrs. Littlepage & Littlepage,
Union Trust Building,
Washington, D. C.

Gentlemen: Reference is had to your letter of November 7, 1928, wherein you transmitted to this office proof of construction of right of way granted July 13, 1889, upon the application of the Choctaw Coal & Railway Company under and pursuant to the provisions of the act of February 18, 1888 (25 Stat. 35), as amended, from a point in the east line of Sec. 33, T. 12 N., R. 3 W., to a point in the west line of Sec. 10, T. 12 N., R. 7 W., I. M., a distance of 25.16 miles.

This proof of construction has been examined and found sufficient, and the conditions governing the grant have been complied with, and the easement considered earned.

This proof of construction was filed in answer to office order of February 11, 1924, wherein evidence was also re- [fol. 154] quired as to the construction of the right of way

granted July 11, 1889, for right of way from a point in Sec. 33, T. 12 N., R. 3 W., to a point in Sec. 4, T. 11 N., R. 2 E., I. M., upon which no proof of construction has been filed.

Evidence of the construction of the last above described right of way should be filed with- the next 60 days or a relinquishment therefor.

You further request that the above described proof of construction be certified. There is no certification or other approval given by this office other than this letter, which should be filed with the duplicate copy of the proof of construction returned herewith.

The evidence of construction as now required should be filed in this office as the local office at Guthrie, Oklahoma, has been discontinued.

In the event no further action is taken by your company, appropriate action will be taken by this office without further notice.

Very respectfully, (Signed) William Spry, Commissioner.

11-10-NBL.

[fol. 155] State of Illinois,
County of Cook, ss:

I, J. E. Gorman, do hereby certify that I am the President of the Choctaw, Oklahoma and Gulf Railroad Company; that the railroad described as follows:

From a point in the east line of Section Thirty-three (33), Township Twelve (12) North, Range Three (3) West, to a point in the west line of Section Ten (10), Township Twelve (12) North, Range Seven (7) West of the Indian Meridian, in the Territory of Oklahoma, a distance of Twenty-five and sixteen hundredths (25.16) miles,

was actually constructed as set forth in the accompanying affidavit of C. A. Morse, Chief Engineer; that the location of the constructed railroad substantially conforms to the map and field notes approved by the Secretary of the Interior on the 13th day of July, 1889; and that the Company has in all things complied with the requirements of the Act of Congress of February 18th, 1888, February 13th, 1889, August 24th, 1894, April 24th, 1896 and the Act of March 28th, 1900.

Choctaw, Oklahoma and Gulf Railroad Company,
(Signed) by J. E. Gorman, President.

Attest: (Signed) Earl Nyquist, Secretary.

[fol. 156] STATE OF ILLINOIS,
County of Cook, ss:

C. A. Morse, being duly sworn, says that he is the Chief Engineer of the Choctaw, Oklahoma and Gulf Railroad Company; that said railroad has been constructed as follows:

From a point in the east line of Section Thirty-three (33), Township Twelve (12), North, Range Three (3), West, to a point in the west line of Section Ten (10), Township Twelve (12) North, Range Seven (7) West of the Indian Meridian, in the Territory of Oklahoma, a distance of Twenty-five and sixteen hundredths (25.16) miles;

that said construction was completed during the year 1890 and that the constructed railroad conforms substantially to the map and field notes which received the approval of the Secretary of the Interior on the 13th day of July, 1889.

(Signed) C. A. Morse, Chief Engineer of the Choctaw, Oklahoma and Gulf Railroad Company.

Sworn and subscribed to before me, this 18th day of October, 1928. (Signed) E. Christiansen, Notary Public. Commission expires Aug. 23, 1930.

[fol. 157] That part of the map attached to Exhibit 12 showing the line of the road across the land involved in these cases follows this page. The solid line is the original location of the road as set out on the map of location filed with the Secretary of the Interior on July 13, 1889, and the dotted line is the location of the road as actually constructed.

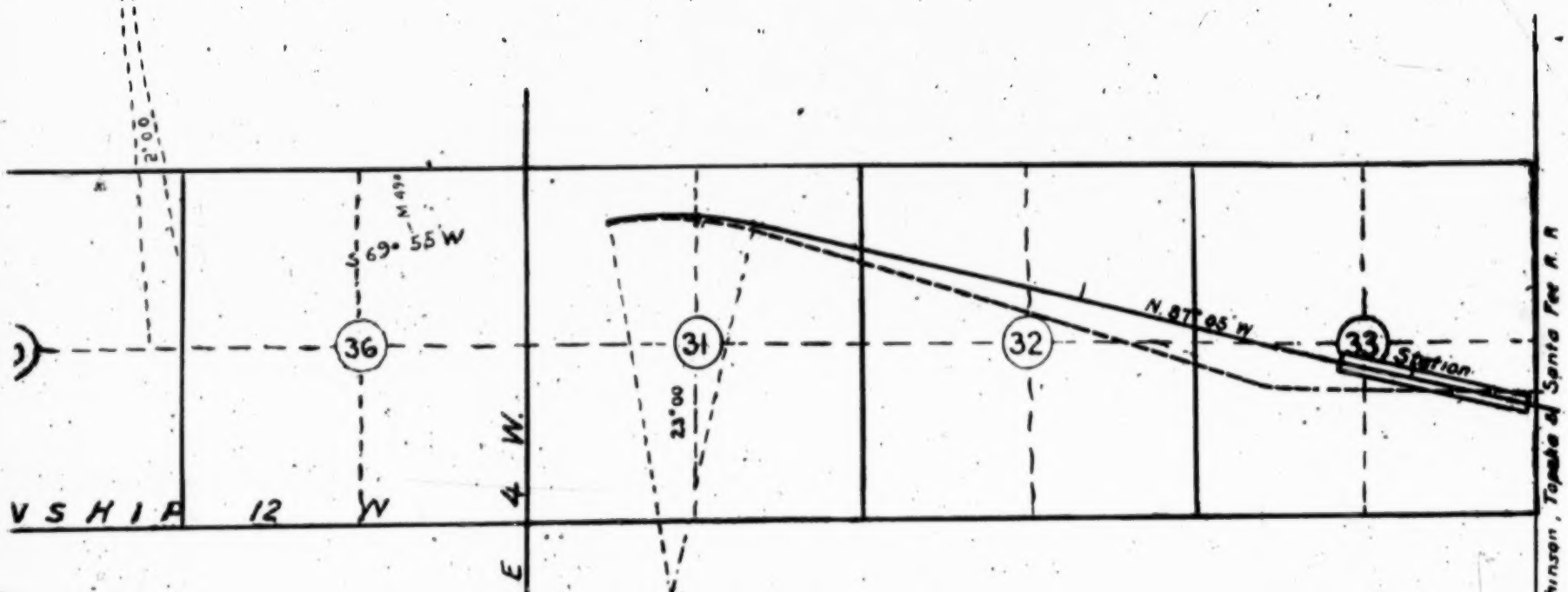
(Here follows drawing, side folio 158.)

[fol. 159] The defendant introduced in evidence as Exhibit 13 a plat of a part of the townsite of Oklahoma City showing the original survey of right of way and station grounds as made by the Railway Company before the Opening and shown on its map of location filed with the Secretary of the Interior on July 13, 1889, and also show-

a m.
Dept. of the Interior
July 13, 1889

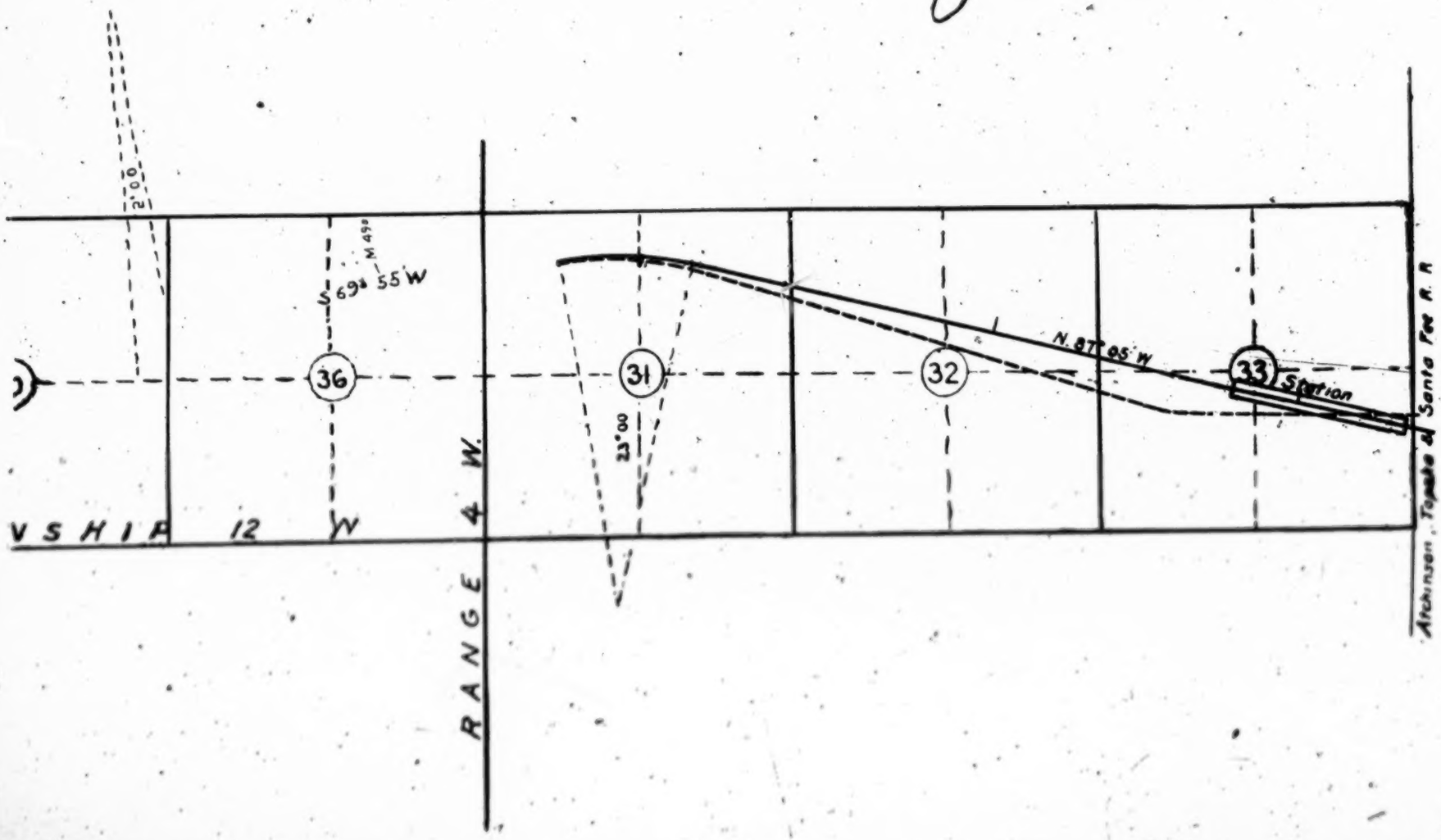
Approved as to that portion of the line of road hereon that passes over public lands and subject to the provisions of the Act of February 18, 1888.

Geo Chandler
Acting Secretary.



Approved as to that portion of the line of road hereon that passes over public lands and subject to the provisions of the Act of February 18, 1888.

Geo Chandler
Acting Secretary.



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FOURTH
THIRD
SECOND
FIRST
AVE S
AVE T
AVE U
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67
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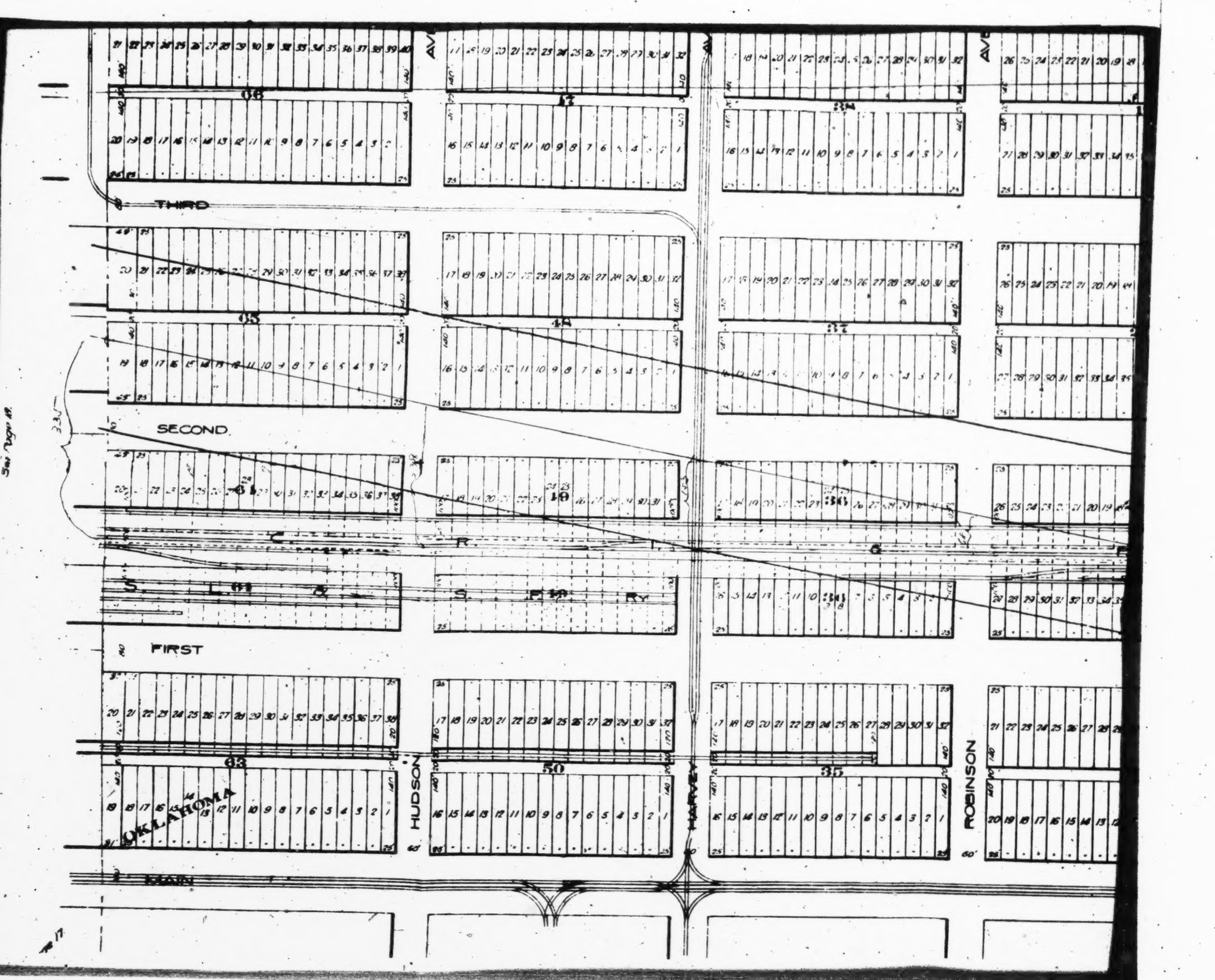
C. R. I. & G.
S. L. M. & S.
S. P. R. R. RY.
DSON
INSON


THIRD
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MAIN
HUDSON
ROBINSON
OKLAHOMA
S. L. & S. F. RY.
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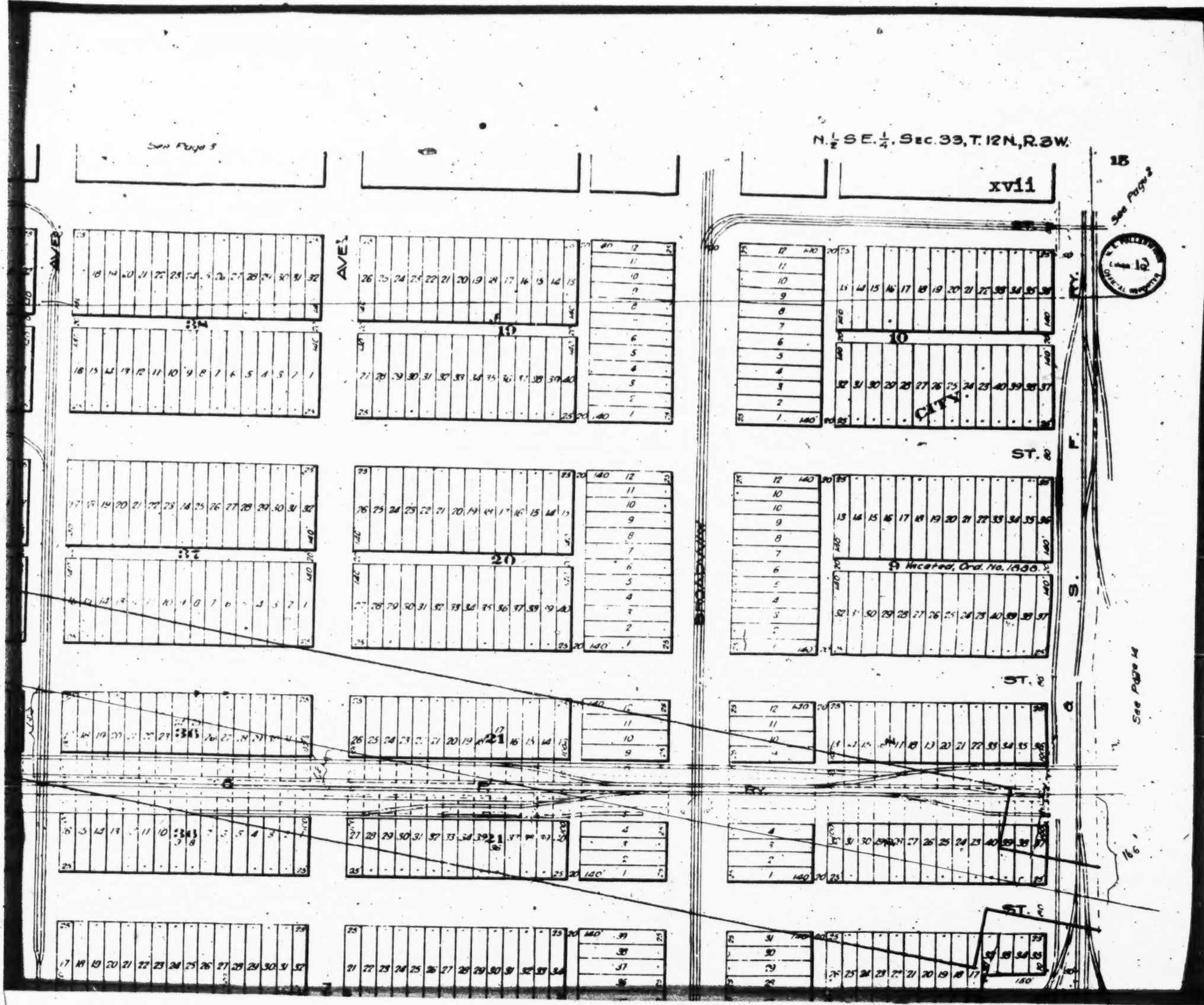
N. ½ S E. ¼. Sec. 33, T. 12 N., R. 3 W.
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See Page 5
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AVE.
AVE.
BROADWAY
CITY
ST.
ST.
ST.
ST.
RY.
RY.
F.
S.
Vacated, Ord. No. 1930.
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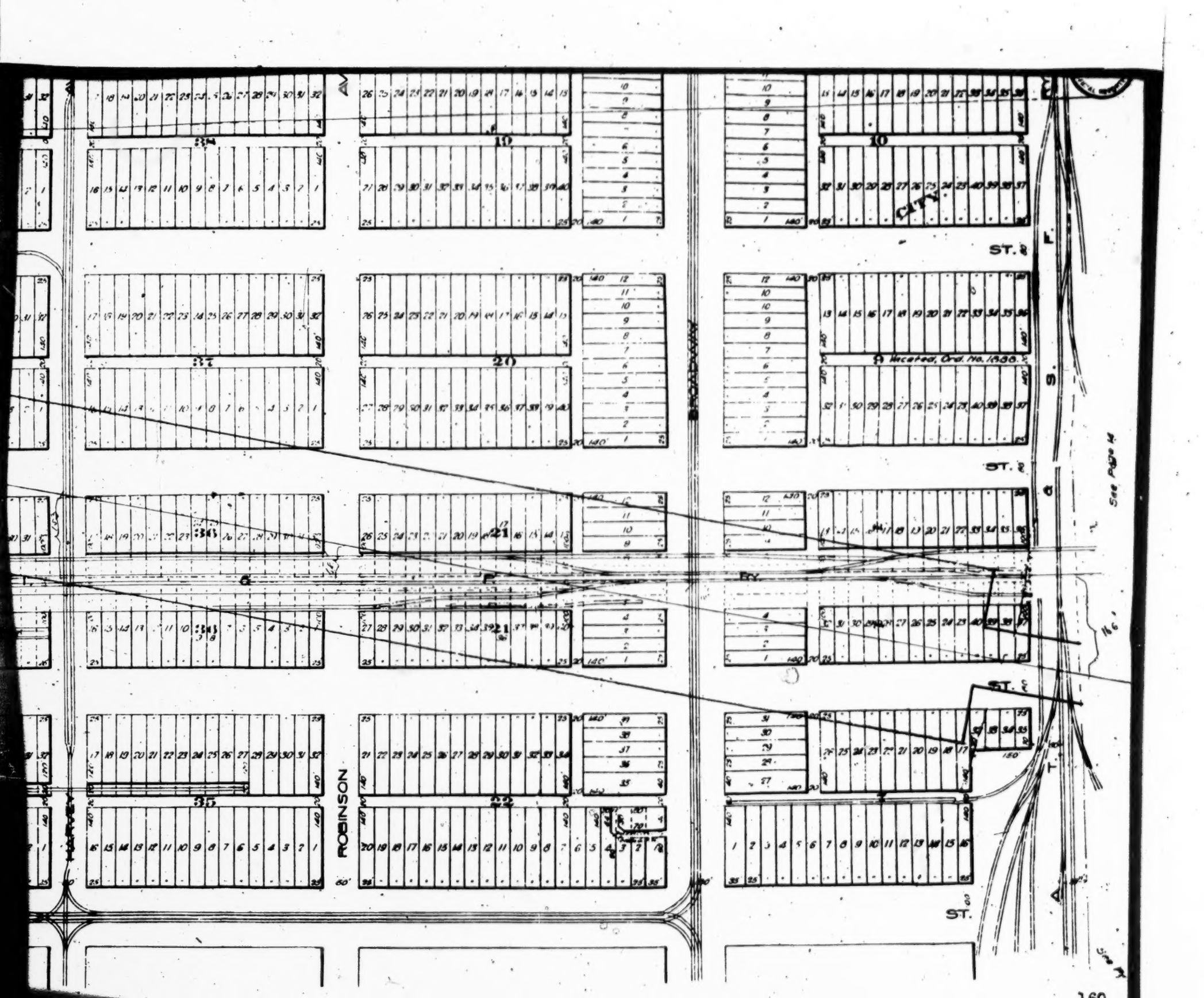
ROBINSON
BROADWAY
CITY
ST.
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ST.
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Located, Ord. No. 1980.
See Page 14

ing the line on which the road was later actually constructed. The diagonal lines are the original survey and the horizontal lines between First Street and Second Street are those of actual construction. The exhibit follows:

(Here follows drawing, side folio 160.)

[fol. 161] Mr. J. W. Maney, being called as a witness on behalf of the defendant, being first sworn upon his oath, testifies as follows (CM-266-287):

Direct examination.

By Mr. Hull:

Q. State your name, please sir.
A. J. W. Maney.
Q. You live in Oklahoma City, Mr. Maney, at this time?
A. Yes, sir.
Q. You are a contractor?
A. Yes, sir.
Q. By profession?
A. Yes, sir.
Q. Mr. Maney, in 1889 and the early part of 1890, did you do some of the grading on the proposed location of the Choctaw Coal and Railway Company on the section of the road between the Santa Fe tracks running north and south through Oklahoma City and the Fort Reno Military Reservation?
A. I did.
Q. Do you recall when you began that grading, Mr. Maney?
A. Yes, I started the work west of where the markers of the Rock Island and what is known as the Choctaw road called for at that time, on the 4th day of January, 1890.
Q. The 4th day of January, 1890?
A. 1890; yes, sir.
Q. As I understand, you began at the west end of that [fol. 162] 25 mile section and graded toward the east?
A. Yes, sir, that's right.
Q. Just who was in charge of the construction for the Choctaw in this part of the country at that time, Mr. Maney?

A. The engineering department?
Q. Yes.
A. Mr. Cornelius.
Q. That's Mr. L. D. Cornelius?
A. Yes, sir.
Q. How far did he grade toward the east end of that section under which—you had a sub-contract under Mr. Spencer, didn't you?
A. Yes, sir, a sub-contract; I graded about four different parts of the line, one west of the Rock Island and three east; I can't say positive the number of miles I graded, but ten or twelve miles.
Q. You didn't, as I understand, do any grading through what was afterwards the townsite of Oklahoma City, under your sub-contract?
A. No, sir, I did not.
Q. Now, Mr. Maney, I wish you would look at this map, Exhibit 13. You are familiar with the City of Oklahoma City, of course?
A. Yes, sir.
Q. And are familiar, by reason of your past associations with the contracting business, with the character of ground that lies in the section to the east, on the north of First Street and up as far north, say as Third Street?
[fol. 163] A. Yes, sir, I think I am.
Q. You have had experience, too, in construction of railroad lines and you have built railroad lines in the past and I think contracted one time for 250 miles?
A. Yes, sir.
Q. In view of your familiarity with the character of the ground lying between First Street and Third Street on the north side and between the Santa Fe tracks and Walker Avenue here on the west?
A. Yes, I know the ground; yes, sir.
Q. Yes, sir; would you say, as a man familiar with the railroad construction, with the construction of a road as actually constructed on this plat as compared to what the construction would have been had it followed the red line as shown on this plat, which would be the more economical construction of that road?
A. The center line of the — that the road was constructed on, was on a practically level bottom land, what we might call light worked and that appeared to be a smooth quality

and the same rate of grade continued which would take heavier cutting, we went clear north as far as Third Street and encountered some rock, while there wasn't any rock on the lower line as constructed.

Q. As a matter of fact, the welfare and benefit to the community, Mr. Maney, which would you say would be the better line of construction, the straight east and west line where the road was actually constructed or the diag-
[fol. 164] onal line as shown on that plat.

A. Well, just as a general proposition, I would say that the line was constructed, as I understand by this map, near the alley and it cut lots of right angles, you might say, while the other line that was constructed at the right of your red lines there, it would cut the lots at an angle and probably be more value to the property.

Q. The red line construction, as I understand you, would leave the remainder of the lots in, almost in a top shape which would make it then of beneficial use; is that true?

A. That's the way I look at it; yes, sir.

Mr. Hull: Yes, sir; that's all, Mr. Maney.

Cross-examination.

By Mr. Garnett:

Q. Mr. Maney, the construction work, about which you testify which you began doing in January, 1890, that was out or near El Reno, was it not?

A. Yes, sir, north of El Reno, where the main line is operated now on that line.

Q. Just what was that railroad, the north and south railroad, known as at that time?

A. The north and south railroad was the Rock Island.

Q. The Rock Island?

A. Yes, sir.

Q. Still the Rock Island?

[fol. 165] A. Yes, sir.

Q. Now, you began about that line and this grading work, both east and west of it?

A. Well, we started west and done the grading work west first.

Q. First?

A. Yes, sir.

Q. When did you begin *to* grading east of the Rock Island?

A. Oh, well, the reason I remember the dates so well west was, it was the day after my birthday, the 3rd day of January, that's how I remembered the exact date when we started the work; I couldn't tell you exactly, but maybe March or April we went east.

Q. How far east did the work that you did extend?

A. It extended, oh, about six or eight miles west of here.

Q. West of Oklahoma City?

A. Yes, sir.

Q. And when did you reach that point with your grading?

A. Within the spring of '90; 1890.

Q. Or, the summer of 1890?

A. Yes, sir.

Q. That would bring it very close to the west line of Oklahoma County, wouldn't it, Mr. Maney?

A. Well, I presume so; yes.

[fol. 166] Q. Sir?

A. I presume it would.

Q. Yes, sir; in reference to the character of ground that the road had to be constructed over, about which you have testified from this map, Exhibit 13, was the fact known in 1890 or 1889, if you know, that there would be rock construction or rock excavation along the north or red line, the course shown on this map?

A. No, sir, I wouldn't know anything about that.

Q. You wouldn't know anything about that?

A. No, sir.

Q. You don't know when it was discovered that there might be rock excavation on that or there would be?

A. No, but I know it would be now.

Q. You know it now?

A. Yes, sir; I didn't know it then.

Q. Yes, sir.

A. Because, I had nothing to do with the grading at that time.

Q. Yes; now, you said that it would be of greater benefit to the community generally, in your opinion, to have the road constructed as it actually was constructed, through the city, that being on a middle line between First and Second Streets?

A. Yes, sir.

Q. And parallel to the east and west streets, as laid out?

[fol. 167] A. Yes, sir.

Q. And the alley through the middle, between those streets?

A. Located practically in the alley.

Q. Yes, sir; the advantage in that is that it cuts the lots at right angles, as you stated, instead of acute angles or taking the centers as the northwest or red line construction would.

A. It took off just part of the lots on each side of the alley.

Mr. Garnett: Yes, that's all.

Redirect examination.

By Mr. Hull:

Q. Mr. Maney, the grading that you began on the 4th of January, 1890, was on a part of this 25 mile section which was shown on that map of July 13, 1889, was it not?

A. Well, my understanding is that map of that 25 miles extended as far west as Fort Reno and I am sure it was this side of the Fort Reno road west of the Rock Island, where the Choctaw crossed the Rock Island Railway.

Mr. Hull: That's all, Mr. Maney.

(Witness excused.) (CM-26-287.)

[fol. 168] Mr. L. D. Cornelius, being called as a witness on behalf of the defendant, being first duly sworn upon his oath, testifies as follows (C-M-288-316):

Direct examination.

By Mr. Hull:

Q. State your name.

A. L. D. Cornelius.

Q. Where do you live now, Mr. Cornelius?

A. Pittsburg, Kansas.

Q. And what is your profession?

A. Civil Engineer.

Q. How long have you been engaged in that profession?

A. About fifty-five or six years.

Q. Did you have any connection with the Choctaw Coal and Railway Company in the years 1889 and 1890 and 1891 and '2?

A. I did.

Q. When did you begin your connection with that company, Mr. Cornelius?

A. The first?

Q. Yes, sir.

A. In August, '88; 1888 in August.

Q. And in what capacity were you connected with them?

A. Transit man at that time.

Q. That was on, I assume, the operation of the line from McAlester?

[fol. 169] A. Yes, sir, and in Texas, to Dennison.

Q. Yes, sir; and, was that—that was the line from Dennison up to what was called Tobucksey County?

A. That's where it started for; yes, sir.

Q. This Tobucksey County, do you know or do you not know, Mr. Cornelius, that that was where the present town of Hartshorne or Haileyville, Oklahoma, is?

A. No, I wouldn't recollect.

Q. You don't know where Tobucksey County was?

A. Oh, only in a general way.

Q. Where was your east and west construction point, so far as the eastern terminus was concerned?

A. The construction or the survey?

Q. Your surveys.

A. The surveys were started at McAlester and went east.

Q. How far east, approximately?

A. About seventy-five miles.

Q. About seventy-five miles?

A. Yes, sir.

Q. And then from McAlester west?

A. Yes, but on the west side our surveys were broken; we had certain points we wanted to cover and we never did do the work continuously and we had to leave gaps to finish later, but at that time we did some work as far as the south Canadian crossing but that was in 1890.

[fol. 170] Q. Did you have any connection with any of the surveys that passed through Section 33 and on which the City of Oklahoma City was afterwards located?

A. Was I on the survey?

Q. Yes, sir.

A. Yes, sir.

Q. What was your connection with the surveying party and the road at that time?

A. I had charge of the party.

Q. You were in charge of the party?

A. Yes, sir.

Q. Mr. Cornelius, you have examined in my office a map that has been introduced here that bears the date originally of July 13, 1889, have you not?

A. Why, I believe so (witness examining Exhibit 11).

Q. That's this map?

A. Yes, sir.

Q. Beginning at the Santa Fe tracks and running through Oklahoma City and extending twenty-five miles west to Fort Reno?

A. Yes, sir.

Q. At the time the country was opened on the 22nd of April, 1889, what was the condition of that survey with reference to the ground itself? Was it staked, is what I am wanting to ask you?

A. At the time of the "opening?"

Q. Yes, sir.

[fol. 171] A. Yes, the entire line across the original claim was staked and marked across the entire claim.

Q. In addition to the stakes and the markings which the company used in their caution to protect its right of way, the day of the "opening?"

A. They did in places; yes, sir.

Q. Did they, to your knowledge, in this quarter section, or do you know?

A. On, the right of way was marked or the center line was marked.

Q. The line being marked, and in addition to that you say that in places they used other means of warning; what other means did you use?

A. Written or printed signs.

Q. Did you have any of your company employees stationed along your right of way any where?

A. Yes, sir, in places.

Q. Well, for what purpose.

A. For the convenience of people who were looking for claims both east and on the west side of the Santa Fe and over on the east side.

Q. To assist them in locating the corners, do you mean?

A. Yes, sir.

Q. And was it also for the purpose, or was it not for the protection of your right of way from settlement?

[fol. 172] A. Yes, sir; yes, sir.

Q. Did those precautions protect your right of way?

A. Yes, they did to a great extent but not entirely.

Q. Well, were there settlements made on your right of way?

A. There were.

Q. When you began the construction of this road, the 25 mile section, between the Santa Fe track and Fort Reno, I understand from Mr. Maney that the construction was begun on the west end of the Section; is that correct? The grading was begun on the western end of the twenty-five mile section?

A. Well, through this section of the country it was; yes, sir.

Q. Yes, sir. Why was that, Mr. Cornelius?

A. Where?

Q. Why?

A. Because it was the only practical place left for us to begin the construction; that is, what was known as, then; the west side of the territory.

Q. Why do you say it was the only practical place?

A. Because we had no right of way on this side.

Q. Why didn't you?

A. Well, our right of way was "jumped" on the 22nd of April, 1889.

Q. The people who came at the opening disregarded your stakes and notices and settled on your right of way [fol. 173] as they passed through this, what was afterwards this townsite?

A. Yes, sir.

Q. Is that correct?

A. Yes sir.

Q. And for that reason you couldn't clear it so you could begin your grading and finish in each section.

A. We went through on the west side.

Q. Yes, sir.

A. We had some steel in transit and we had to have a place to unload that material, that is, we had steel and ties and telephone poles in transit at that time, or, we understood they had it loaded, rather.

Q. Now, Mr. Cornelius—are you through?

A. Yes, sir.

Q. Mr. Cornelius, do you know the position of the actual construction of the road, do you not, where the road was afterwards actually constructed?

A. Through the townsite here?

Q. Yes, sir.

A. I do.

Q. That was not on the exact line which had previously been surveyed?

A. No, sir.

Q. Do you know why the line of actual construction runs east and west while the map showed a line extending in a generally north-westerly direction?

A. Why, the main line east and west to town was constructed?

[fol. 174] Q. Yes, sir

A. I think I do.

Q. Tell the Court why that was, Mr. Cornelius, if you know, to your own knowledge.

A. It was a matter of expediency and it simplified the matters in regard to getting started on our construction and it was also desirable from a construction standpoint too, as far as buildings were concerned in the future; that was considered at that time; when I first put the line through, there wasn't anything done; was no buildings at all then.

Q. I understand, Mr. Cornelius, it's alleged in the reply filed in this case that a controversy had arisen between the citizens and the occupants of that territory or portion of the townsite and the railroad company as to the right of the road to the particular property; are you familiar with that fact, that there was some controversy existing at that time?

A. Yes, sir.

Q. That controversy started immediately after the country was opened and you found your right of way had been settled upon, did it not?

A. Yes, sir.

Q. And negotiations were conducted and the threats of litigation continued through quite a period of time?

A. Why, in fact, we pulled our "outfit" out of the country here and went over east so we could get something finished.

[fol. 175] Q. Mr. Cornelius, did you locate the line that was afterwards actually constructed upon that line running due east and west from the Santa Fe?

A. Yes, sir.

Q. When did you make that location?

A. Sometime between the 10th and the 17th of September, 1890.

Q. Between the 10th and the 17th of September, 1890?

A. Yes, sir.

Q. And that was the location upon which the road was afterwards constructed?

A. To the best of my belief it is; yes, sir.

Q. At that time, did you mark it to the point where your transit points?

A. Yes, sir.

Q. And that location that you made between the 10th and the 17th of September, 1890, was afterwards approved by Major Shellenbarger who, I understand, was the executive officer of the road in this country at that time?

A. Yes, sir.

Q. And the road was later constructed on that location?

A. It was.

Mr. Hull: I think that's all.

Cross-examination.

By Mr. Garnett:

Q. Mr. Cornelius, you were on the survey through Oklahoma City, which is now Oklahoma City, in 1889, I believe [fol. 176] you stated?

A. Yes, 1889.

Q. That was in advance of the "opening" of the territory, including Oklahoma City, to public settlement on April 22nd, 1889?

A. Yes, sir, we were "sooners."

Q. Yes. The profile or location map, which has been put in evidence as Exhibit 11, that shows the survey that you made at that time?

A. On that map?

Q. Yes, sir.

A. Yes, sir, that's the survey we made at that time.

Q. When did you begin that survey and when did you complete it?

A. At what point?

Q. Down on this twenty-five mile strip or this twenty-five mile section?

A. The latter part of February and March and April, the middle of April and we were here right up to the 22nd and after the 22nd.

Q. Which end of this twenty-five mile section did you begin your survey?

A. The Santa Fe.

Q. Begun at the Santa Fe and surveyed west?

A. Yes, sir.

Q. And then you began your survey at the Santa Fe, you would say the latter part of February, 1889?

A. The latter part of February or later.

[fol. 177] Q. Or later?

A. Yes.

Q. Now—— (interrupted).

A. It was between February—it was the winter and spring, and about the middle of March, or, I should say the middle of April.

Q. The middle of April?

A. We was doing this field work on both sides, both sides of the Santa Fe.

Q. Of the Santa Fe?

A. And it would be hard for me to exactly fix the dates of those particular surveys.

Q. Yes, sir. Well, are you able to say that the survey from the Santa Fe west had been made before April 22nd, 1889?

A. Yes, sir, and through—clear through the territory.

Q. Yes.

A. That is, the original Oklahoma Territory, it was all surveyed and staked down before April 22nd, 1889.

Q. Now, then, how was it staked out? The stakes marking the center of your proposed line of road?

A. The center line—yes, sir—and it was usual to drive those stakes a hundred feet apart?

Q. A hundred feet apart?

A. Except where topography and water elements called for stakes closer than that.

[fol. 178] Q. Yes. There were no stakes marking the outside boundaries?

A. There were places; yes.

Q. There were at places?

A. Yes sir.

Q. Were there in this section, southeast of thirty-three, what's known as the Oklahoma City Section, marking the outer boundaries of your previous surveys?

A. Yes, sir, there was stakes set there; center stakes.

Q. How far apart were they?

A. Through the center line, the center line of the stakes were a hundred feet apart and our station, "naught" was at the center of the Santa Fe main line.

Q. Yes. Now, the stakes which you say marked the outside boundaries of your proposed right of way, how far apart were they?

A. The outside bounds and corners, the outside corners were staked and signs put on them, written with red keel, that's what they used for marking stakes and the only thing available here at that time.

Q. Yes; all right. Now, you had stakes at the outside corners?

A. Yes, sir.

Q. How far apart were those corners then, or those stakes?

A. Well, three hundred feet; well, the present distance would be three hundred and the next distance from the corners would be three thousand foot long to your stakes.

[fol. 179] Q. How far are these stakes along the outside?

A. At points of visibility.

Q. That's all?

A. Yes, sir.

Q. Then, these corner stakes you referred to were three hundred feet apart across that line of the proposed right of way?

A. Yes, sir.

Q. And were three thousand feet apart parallel to it with the stakes at intervals in between?

A. Yes, sir. That would cover it.

Q. And then you had signs up along; were those signs along the edge of the right of way or outside of it?

A. They were on the boundary of the road.

Q. The boundary of them?

A. Yes, sir, at noon April 22nd, 1889.

Q. And those signs contained some form of notice that that had been surveyed and taken for a railroad right of way?

A. Well, that would describe it; yes, sir.

Q. Do you know what was on them, exactly?

A. The right of way of Choctaw, Goal and Railway Company; something to that effect; a short sign; we didn't have very much room.

Q. Now, I believe you testified the line later was actually located differently from that shown on this location map? [fol. 180] A. Yes, sir.

Q. In the meantime, did you make other surveys of other proposed locations through and around Oklahoma City?

A. Between the 22nd of April, 1889 and the first or second week in September of the '90's, do you mean?

Q. Yes.

A. We made—we changed some of our locations west, a few miles west of here and we ran a lot of—later we ran another line north of here.

Q. Well, did you run a line south also?

A. Yes, sir.

Q. That was during the time that the controversy was on between the railroad and the citizens over who was entitled to this property where your right of way was located?

A. Yes, sir.

Q. I may say that the newspapers of that time referred to the north, proposed north survey or proposed south survey, so you ran at least two lines of survey or possible location in addition to the one that is shown on this Exhibit 11?

A. Well, I don't know whether there is any newspaper controversy about it or not, sir.

Q. Well, you did make or you did survey?

A. We made the survey; yes.

Q. With the view of the possible location of the road on those surveys, did you not?

[fol. 181] A. The one north, especially so; yes, sir.

Q. What was the one south made for?

A. I don't know unless to keep the boys busy at that time.

Q. Yes, sir.

A. Would be about the only reason I can assign for it, now. (Laughter.)

Q. Now, immediately on the opening on April 22nd, 1889, your right of way through Oklahoma City was "jumped," as you call it, was by claimants?

A. Yes, sir.

Q. That's correct. All of your right of way was occupied by persons claiming it as settlers, was it not?

A. Yes, and it was done very suddenly.

Q. Yes, done within twenty-four hours at least after April 22nd?

A. Twenty-four minutes.

Q. Sir?

A. After they commenced to fill up the others, it was about twenty-four minutes.

Q. Twenty-four minutes?

A. Yes, sir. (Laughter.)

Q. These claimants or settlers disregarded your stakes that had been driven for this right of way entirely?

A. Well, the ones who—the first ones probably, that was probably a lawful disregard of our rights.

Q. (Continuing) Come in and they did, in fact, do that?

[fol. 182] A. Oh, yes.

Q. They just disregarded these stakes?

A. Yes, sir.

Q. And went on there and took their lots?

A. Yes, sir.

Q. Now, do you know when, or do you know that the plat of the survey of Oklahoma City, as afterward adopted by the townsite trustees and which had been marked Exhibit 5, that plat was made almost immediately after the "opening," was it not?

A. I think it was but I wouldn't be certain.

Q. Do you know a man by the name of Chamberlain, a surveyor, who surveyed the townsite here?

A. No, sir.

Q. You don't know him?

A. No, sir.

Q. Well, how did those claimants who "jumped" your claim, how did they make their claims?

A. Staked.

Q. Staked their lines?

A. And they "squatted" from those lines.

Q. Yes.

A. There was the Oklahoma City townsite within a few days; there was some lines staked out, as I recollect it, but I wouldn't be certain about that date; I think that there was right within a few days.

Q. And those lots staked are in conformity to the streets and alleys, as laid out, are in conformity to this plat, Ex-
[fol. 183] hibit 5, which was later adopted as the plat of Oklahoma City. That's correct, isn't it?

A. I believe they were; yes, sir.

Q. Within a short time, at least, the streets and alleys as they now exist, as shown and in use by the city?

A. Yes, sir.

Q. How soon did that occur after the "opening"?

A. Within a very few days.

Q. A few days—less than thirty days anyway?

A. Oh, yes, I should imagine so.

Q. You said that you made the survey of the line on which the road was afterwards built, as shown on these exhibits and as a matter of common knowledge, it was when it took a little course between First and Second Streets through the city, at the time you made that survey between the 10th and 18th of September, 1890, what's now First Street and Second Street, had been in use and occupied as a street for a long period of time, hadn't it?

A. Yes, sir.

Q. And these lots fronting south on First Street and north on Second Street was occupied and improvements put on them, had they not?

A. Did they front on First and Second Streets?

Q. Yes, sir, south on First Street and North on Second Street.

A. Oh, yes, they did that.

Q. You ran your line of your survey right down that alley and took about forty feet off of the back end of the
[fol. 184] alley on each side.

A. That was the intention at that time.

Q. Yes, sir.

A. To run the line down the center of the alley but there was not width of the right of way determined at that time.

Q. No, I see, but the right of way was later acquired?

A. Yes, sir.

Q. But, at the time you made your survey, these lots were all improved and occupied?

A. Well, not all of them.

Q. Not all of them?

A. No.

Q. Most of them?

A. Yes, sir.

Q. You stated that you began construction work at El Reno because it was the original point, as I understand you to explain, there was no controversy over a right of way and was over here, so you had no place to go to work; is that right?

A. Yes, sir, we had no home.

Q. Sir?

A. We had to go and do the work over there but to go and carry it out.

Q. And you were prevented from going to work here because people who had occupied these lots were claiming them?

[fol. 185] A. Yes, sir.

Q. And denying the railroad's title?

A. Yes, sir.

Q. Do you have any knowledge of the settlement of the controversy between the citizens and lot claimants on the one hand and the railroad on the other as to the change of the location of the right of way?

A. I don't know anything of the details.

Q. Yes; do you recall that the passage of the Bill through the House was procured to authorize the City to pay bonds to acquire the right of way along the line between First and Second Streets where the road was afterwards built and give it to the railroad if the railroad would change its location from the proposed location map first filed?

A. No, sir.

Q. You don't know about that?

A. No.

Q. Well, do you recall that there was a citizens committee organized and a fund raised by subscription to acquire that right of way between First and Second Streets and give

it to the railroad company in consideration, if the railroad company would abandon the line it was claiming for its located line and go through on that line?

A. Yes, there was a citizens committee that I met here several times and that was early in 1890 first.

Q. Yes; well——

A. But there wasn't any compromising stuff about it; we never recognized that there was any controversy about [fol. 186] our right of way or our rights of a right of way.

Q. What was the subject matter of those meetings and conferences of the citizens committee?

A. They were trying to compromise, to get the matter straightened out with the railroad company and the city of Oklahoma, to get this construction started across here.

Q. Yes.

A. The public were anxious for the railroad to be built.

Q. Yes; and the railroad company was anxious to get it built.

A. Yes, under their rights.

Q. Yes, under their rights. Now, as a result of their conferences, do you know whether or not it was agreed that the citizens would satisfy the lot claimant and procure the right of way through between First and Second Streets where the road was later built and where you ran your September, 1890, survey, if the railroad would accept that and abandon its claim to the right of way as originally located north of that right of way and let those lot claimants have their lots?

A. It was done but not for that reason.

Q. Well, it was agreed upon that it would be done and it was done; is that right?

A. With the——(interrupted).

Q. I am not asking for the reason; I am just asking for the facts.

[fol. 187] A. Yes, it was done.

Q. It was done by agreement?

A. Not entirely, sir.

Q. Well, the railroad did, in fact, accept a right of way between First and Second Streets as surveyed by you and in September, 1890, was it not?

A. Their acceptance had nothing to do with the citizens committee.

Q. Well, they did it anyway?

A. They did it; yes, sir.

Q. And they abandoned their claim to the——

A. We had an amended plat; an amended survey.

Q. Yes.

A. Yes, we had a right to do it under the grant of Congress.

Q. Yes; I wasn't asking you how you had a right to it; I just wanted to find out what you did.

A. Yes.

Q. Now, then, the line as located on this location map, the first survey you made in the spring of 1889, that was abandoned for the east and west line between First and Second Streets?

A. They were on the amended line; yes, sir.

Q. But, made no further claim to this north located line, did they, to your knowledge?

A. I couldn't say as to that. The matter rested in status quo, I should judge.

[fol. 188] Q. And now, after forty years, it's still in status quo, this north located line?

A. No, it's been pretty active down on that right of way in the last forty years.

Q. Well, I am referring to this north located line which you surveyed across here in the spring of 1889.

A. Yes, sir.

Q. And as far as you know, there has been no claim made by the railroad that this line north of the present right of way, that was included in that survey.

A. No, I think not; not to my knowledge.

Q. Yes, sir. Now, you said you made an amended survey; when did you make that plat; was that based on your survey of September, 1890?

A. That was—yes, sir, the latter part; I can say the fore part of September, 1890.

Q. Well, you said it was between the 10th and 18th of September, 1890.

A. Some place along there—yes, sir—the 10th and the 18th.

Q. Do you know where there is a plat of that survey just referred to as an amended plat?

A. I don't know, sir, where it is.

Q. Do you recall any of the persons that were on that citizen committee you met with and conferred with about settling the controversy?

A. I do; yes, sir.

[fol. 189] Q. Who were they?

A. I don't know who they all were but—oh, now this is practically, this is purely from recollection.

Q. Yes, sir, I understand.

A. Mr. Pettee or Pattee was one of the citizens committee and Mr. Overholser here, I think his name was, was quite active and Major Hidecooper from Erie, Pennsylvania, I don't know whether he was on—I don't think that he was on the committee himself, but he was in the advisory capacity with the committee and a Mr. Delaney who was receiver of the Land Office at that time; I think his initials were J. C. Delaney and Judge Burford.

Q. Did you meet Doctor A. C. Scott; do you recall him in connection with this?

A. Doctor Scott?

Q. Yes.

A. I remember a Scott but I don't know whether it's the —I can't place him.

Q. Yes, sir.

A. Is that the gentleman? (indicating).

Q. Yes, sir, that's Doctor Scott.

A. Yes, sir, I have seen him before; I never happened to see him again, from that time on until this morning in the Court room; that is, to know what his name was except that I possibly got out there—may I ask that gentleman a question?

Q. Well, it's all right with me; I don't care.

[fol. 190] A. It might be a family resemblance, that I later knew a John B. Scott.

Q. Yes.

A. That's why, but there is something about that gentleman there that struck me very——

Q. Well, do you recall that he had some part in those negotiations?

A. Yes, sir, I am quite certain of it.

Mr. Garnett: That's all.

Redirect examination.

By Mr. Hull:

Q. Mr. Cornelius, the north and the south surveys that you think were amended and were entirely out of the

quarter section on which the townsite was afterwards located, were they not? The north survey was two miles and a half north?

A. Oh. Yes, sir.

Q. And the south survey was on the other side of the river?

A. Oh, south survey from the south side of the Canadian River and our north survey, which was west would have been followed if they hadn't recognized our rights to a certain extent, began over here by Council Grove, about eight, probably eight or nine miles west of here and crossed the divide out here about two and one-half or three miles north and joined our old original survey about eight miles east and that was the line that they were determined to fol- [fol. 191] low at that time and it would have been followed there if it hadn't been for Major Shellenbarger recognizing the fact that there were lots of innocent purchasers on that ground and they said they might be able to protect; and that was the reason for Major Shellenbarger violating that change.

Recross-examination.

By Mr. Garnett:

Q. Yes, Major Shellenbarger was the executive officer of the road?

A. He was the chief engineer located at, his headquarters at McAlester.

Q. Yes.

A. And in Dennison, Texas.

Q. Now, the north route, two or three miles across the town, north of the present line?

A. Yes.

Q. Would have been followed on but he wanted to recognize the rights of innocent speculators along this bed route, as located?

A. Yes, sir.

Q. All right. If it hadn't been for that fact, then the road would have definitely changed this first location and built along this northern location?

A. Yes, sir.

Q. Recognizing that people had settled on lots down here in town, expecting to be close to the railroad, he made the

arrangement with the city, they agreed to the proposition [fol. 192] of changing lines to go through parallel to the streets and alleys as laid out on the plat?

A. Yes, sir.

Q. And that right of way was furnished by Oklahoma City, or, its citizens, without cost to the railroad?

A. Part of it was; not all of it.

Q. Did the railroad pay for any of it?

A. No, but they had it by Congressional Grant; they had part of that.

Q. Yes, that's what they claim.

A. What was an original right of way, three hundred feet wide and they compromised the course two hundred and fifty or three hundred feet west of the Santa Fe.

Q. Yes; but, now, did the railroad pay anything for this later acquired right of way, where they actually built?

A. I don't know whether they did or not. You will have to ask the right of way man.

Q. You don't know?

A. No, sir.

Q. You don't know that the City raised ten thousand dollars and paid the lot owners for that right of way, do you?

A. No, I don't know whether they did or not; it wouldn't have been up to me; it was out of my jurisdiction.

Q. Yes, sir. All right, now, you say that line as located, I mean as actually built and that line which was located on your first survey pro rata, was it not?

[fol. 193] A. Yes, sir.

Q. Do you know that the occupants of those lots did not recognize the railroad's claiming right of way and that the right of way from them was purchased by the citizens committee, just the same as the other?

A. I don't know what was done.

Q. You don't know what was done?

A. No, our right of way was all "jumped."

Q. "Jumped"?

A. Yes, sir, that was the term that they used at that time.

Q. Yes, sir, it's pretty well understood, I guess. Now, this fact you are clear on, that the railroad did not purchase, as far as you know, any right of way on the final location where it was built?

A. I don't know, sir.

Q. Oh, you don't know?

A. No, I don't know who bought it or the price and I wouldn't be in a position to know.

Q. Or, whether the railroad company paid anything to anybody or whether it was acquired by the citizens that gave it to the railroad?

A. I only know, sir, that there was a Citizens Committee active in getting those matters straightened out but what it was or what the terms were or the amount, I couldn't say.

Mr. Garnett: Yes, sir. That's all; that's all.

[fol. 194] Redirect examination.

By Mr. Hull:

Q. Mr. Cornelius, do you know that the Choctaw Coal and Railway Company was in pretty straitened and financial circumstances, don't you?

A. Yes, sir, very much.

Q. You know, as a matter of fact, that they later sold their right to the road which was afterwards known as the Choctaw, Oklahoma and Gulf?

A. Yes, sir.

Q. And when did you leave the employ of the Choctaw Coal and Railway Company?

A. On the 31st of December, 1890.

Q. And did you remain in this country or did you go somewhere else?

A. I went to Dennison, Texas.

(Witness excused.) (CM 288-316.)

[fol. 195] Mr. J. M. Owen, being called as a Witness on behalf of the Defendant, being first duly sworn on his oath, testifies as follows (CM 328-344):

Direct examination.

By Mr. Hull:

Q. Just have a seat, sir. State your name to the Court.

A. J. M. Owen.

Q. You live in Oklahoma City, Mr. Owen?

A. Yes, sir.

Q. And, at this time, are connected with The Oklahoma City Building and Loan Association?

A. Yes, sir.

Q. That's the original, was it. You were here the day of the "Opening" of the country on April 22nd, 1889?

A. Yes, sir, I got in town late that evening.

Q. Mr. Owen, I wish you would tell the Court what you know about the condition of the proposed right of way of the Choctaw Coal and Railway Company on the day of the "Opening," April the 22nd, 1889, if you — anything about it?

A. Not on that date, I wouldn't; I camped the first night —I come in from the east line; I drove in, in a spring wagon—the Kickapoo line—and camped up here on what is Linwood, now; it was called "Lone Grove," this patch of timber, it was, on the high hill; Linwood, it is, now; we camped there the first night and didn't come down in town here at all. We got up early, the next morning and about [fol. 196] sun-up and came on down town and the first, we attempted to "settle" on this quarter section just east of the Santa Fe here, but, that was a Military Reservation and we weren't permitted to "settle" there, so, we turned on down and came in on Reno—what is now Reno—that was a Section line and I "staked" a lot on Reno, and then, I "staked" one on Washington and I was pretty busy that day and I didn't get up in this part of town for a day or two but I went in to the real estate business, buying and selling lots; that is—trafficking in lots—I didn't buy any and in the maneuvering around here in this part of the town, the first time I came up here was a few days afterwards, there were stakes there, saying: "Keep Off," the Choctaw Coal and Gulf—no, the Choctaw Coal and Railway Company right of way and just a short time after that was when I first came in, that were no—that is, after I had located in town, there was no "proving" here and it wasn't for two or three days, you built shacks, there was no houses built at the time and the first lumber that we got was—there wasn't any stuff shipped in here, I think it was about the 27th or '8th; well, it was just tents up here and there and it was a tent town. Then, a few days—I don't know how many days after the country "Opened"—there was fur-

rows plowed through there and a furrow on each side of the right of way, as best they could plow it, showing the right of way; kinda marking it out.

Q. Did the people regard those warnings or did they disregard them and occupy the places?

[fol. 197] A. When we got here, the townsite wasn't surveyed at all and we surveyed it ourselves. One outfit was started by Charlie Chamberlain, he took Main Street and surveyed on north and the surveyor went along; we all adjusted ourselves to these lines as the surveyor went along and when he got to the railroad right of way, he paid no attention to it; he just "plowed" right on through it.

Q. You just kept on adjusting yourselves, did you?

A. We just kept on adjusting ourselves, as surveying the lots right along. Well, another Surveyor by the name of Patrick started a survey at the section corner on Reno Avenue and started south. Then, there was a Citizens' Survey that started from Reno Avenue and started north. There was three (3) Surveys, surveying outfits; then, we all adjusted ourselves to these different surveys.

Q. Mr. Owen, after the proposed right of way, or, the right of way, as it was marked on the ground, was occupied by the people who came in on the day of the "Opening", were any negotiations begun, looking towards clearing that right of way, or, else, having the railroad built through some other portion of the townsite, what was afterwards the townsite?

A. I never heard them claim any other location except right through town there and they were insisting on it. I remember Mr. Chadick at the time; he was President of the Choctaw, wasn't he? He was over here; he had come over in a private car, I remember, once in awhile but he would stay on the side-track down here, out at Kala—an [fol. 198] inland town over there—park on it and the lots on the right of way, they claimed there, would fluctuate the prices on them, and, people would disregard it, and then, they would some way or another, create the feeling that they were going to build through there and you had better not build on those lots and the people didn't improve them very much and the prices of the lots would go up and down, they would fluctuate, as the people would have to move; they would lose their lots if they built there and then, in a little while, they would get over that. I remember I bought one

lot on Broadway some time during the summer of '89, when the tide was running against the lot owners, the feeling that the railroad was going to build through there, I bought a lot for twenty-five dollars ($25.00) on Broadway, and, in that Fall, in December, when the people doubted whether they would ever build through there or not, I "climbed" out; I sold that same lot for one hundred and twenty-five dollars ($125.00); and then, along the next Spring, why, I could have bought it for less money and wouldn't buy it. So, they just fluctuated that way. (Laughter.)

Q. Well, Mr. Owen, it's a fact, isn't it, that those negotiations and the controversy over the title to the property in the right of way and the right of the railroad to take this right of way through the townsite continued over a period of eighteen (18) months or more after the country was "opened"?

A. Oh, it continued until it was finally settled.

[fol. 199] Q. It was settled by the Quit Claim Deeds that were taken?

A. Yes, we jumped out here and voted Bonds, forty thousand dollars ($40,000.00) in Bonds to clear that right of way, and then, went to Congress and made it materialize and they passed that through Congress and the President vetoed the Bill.

Q. On the theory you had no power to issue bonds for that kind of a concession?

A. Yes, sir, the Territory had no right and was later re-enacted.

Q. And they did raise the money by subscription among the citizens of this town and paid those people, in consideration for those Quit Claim Deeds?

A. Yes, sir, the only way we could raise the money, was, by subterfuge; we started out; I was one of the Soliciting Committee and started out to raise twenty-five thousand dollars ($25,000.00); we believed that would clear the right of way and by subscription and we worked at it for, oh, several days and there wasn't anybody here had any money and we fell down and we wasn't able to raise it by subscription at all, and—at that time—we had a "Character" here, Mayor Gault and he "sprung" a proposition on us at one of the Meetings, that we meet and make a Report on these different conditions. He said: "People want this railroad; we will never be able to raise this by subscription; I see that and," he said, "I have thought the matter over and,"

he says, "I have a scheme in my mind, whereby, I believe [fol. 200] we can put it over; it's illegal", he says, "but," he says, "I believe that the community wants the road bad enough, that they will stand for it." "Well, what was it?" "Well, he says, "the Saloons here will pay a three hundred dollar ($300.00) City License and a two hundred dollar ($200.00) County License." He says: "If the Citizens will back me and the Council up, we will pass a Law, or, pass an Ordinance, accepting Choctaw Scrip, we will issue what we call Choctaw Scrip, we will pass an Ordinance accepting Choctaw Scrip for half of the Saloon License, City Saloon Licenses until this Scrip is all absorbed; that will make a market", he says, "for the Choctaw Scrip, at seventy-five cents on the dollar, I think we had ought to sign up, sign the Saloon people for seventy-five cents on the dollar and they will be glad to have it and it will finally absorb all that; now, you Gentlemen that subscribe five hundred dollars ($500.00) or a hundred dollars ($100.00) or twenty-five dollars ($25.00), whatever it was, payable, your subscription and you will gradually get your money back, on the question of expense and everybody will, share and share alike, in the expense of this, buying this right of way." J. L. Brown, an attorney, that was one of our advisers about anything of that sort, he got up and he said: "You are over-stepping the sanctity of the law by that; it won't stand up." And Mr. Gault said: "I knew that, but", he says, "I believe public sentiment is behind us and I believe they will do it." They did that and that's the way they raised the money.

[fol. 201] Q. In any event, some money was raised and the people who were claiming the north forty feet (40') of the south lots and the south forty feet (40') of the north lots were paid the consideration and executed a Quit Claim Deed to the Railroad Company for the road where it was actually constructed?

A. Yes, sir. Here was the proposition there: There was quite a number of people that owned those lots and they were not very valuable, especially after you had those parties that owned property elsewhere that would be more valuable if the road was on here and merely deeded their forty feet (40') for nothing; that's why we were able to get through with twenty-five thousand dollars ($25,000.00).

Q. And after you had cleared that right of way and stopped any possible litigation over it, then, the road was built across there?

A. Yes, sir; and, that had to be built by Receiver's Certificates, then; the Choctaw Coal and Railway Company prior to the time we got ready and complied with our contract, they went into the hands of a Receiver, and finally, Judge Clark ordered them to issue Receiver's Certificates and build the road from El Reno in, through Oklahoma City, with Receiver's Certificates.

Q. Mr. Owen, do you recall what was the date, or, approximately, the date of the final completion of this section between here and El Reno; was it early in 1892?

[fol. 202] A. Well, it was the Act of Congress that did that. I don't know. We had quite a "Blow Out" when it came in; I forget; no, I wouldn't say.

Q. Well, it was constructed through, though, of course?

A. Oh, yes.

Q. And operated as a road?

A. Yes; yes, sir.

Mr. Hull: I think that's all.

Cross-examination.

By Mr. Garnett:

Q. Mr. Owen, I have here, a Paper, marked Exhibit 14, which purports to be a part of the Minutes of the Meeting of the City Council on March 10th, 1891, where there was a Resolution adopted in relation to issuing those Certificates of Indebtedness, about which, you have just testified, (Counsel handing Witness Exhibit 14 for his examination.)?

A, The Choctaw Scrip?

Q. Yes?

A. Yes, sir.

EXHIBIT 14

Identification is waived and Exhibit 14 is offered and admitted in evidence. It is as follows:

[fol. 203] Minutes of City Council of City of Oklahoma City, Book 1, Page 101.

"Oklahoma City, O. T. Mch. 10th, 1891.

"The Council met as per adjournment with Mayor presiding and all members present. The minutes of the previous meeting were read and approved.

"On motion of Miller, the Mayor was authorized to issue certificates to all parties subscribing to the C. C. & R. Ry. Co. fund drawing 8% per annum, the same to be legalized by the legislature.

"The same carried unanimously.

* * * * * * *

"Adjourned to Saturday Night, Mch. 14/91.

T. M. Upshaw, City Clerk.

"Approved: W. J. Gault, Mayor."

By Mr. Garnett:

Q. Now, that "C. C. & Ry. Co." there is the Choctaw Coal and Railway Company, about which, you have testified?

A. Yes, sir.

Q. That has reference to those Certificates of Indebtedness?

A. Yes, sir.

Q. Yes. They never were, in fact, legalized by the Legislature, were they?

A. Not that I know of.

[fol. 204] Q. They were redeemed in the manner you have indicated?

A. Yes, sir.

Q. By being accepted in payment of Saloon License fees?

A. Yes, sir.

Q. I believe you stated that Charlie Chamberlain made a survey from Main Street, north?

A. Yes, sir.

Q. Within a few days after the "Opening?"

A. Yes, sir.

Q. Now, do you know, whether or not, that survey is the one that was later adopted by the townsite Trustees as the Official Survey of Oklahoma City?

A. It was.

Q. It's the one?

A. Yes, sir.

Q. And lots were "staked out," then, according to that Survey?

A. Yes, sir.

Q. This map that's been exhibited and put in evidence as Exhibit 5—I think it's 5—yes, that is it, at least, in-

cludes the Chamberlain Survey from Reno Street, north?

A. No; no, the Chamberlain Survey only came to here (indicating on Exhibit 5); just made this——

Q. That is, they were south?

A. The Chamberlain Survey only came to the street, I mean, to the north alley between Main Street and Grand Avenue.

[fol. 205] Q. Yes; all right; then it extended north?

A. Yes.

Q. And from there, north?

A. About to Seventh Street.

Q. About to Seventh Street?

A. Yes, sir.

Q. Yes, sir. Well, that's the top of the Map?

A. Yes.

Q. That's the Chamberlain Survey?

A. That's it.

Q. Yes; and, that's the same Survey that the City mapped on, from then on, until it was officially adopted by the townsite Trustees?

A. Yes, sir.

Q. And, is the Survey that constitutes the City, now?

A. Yes, sir.

Q. Then, how soon—you said, a few days; then, how soon after that, after April 22nd, was this made, would you say? Within a week?

A. Oh, it took several days to make that Survey.

Q. Well, it wasn't over a week or ten days, was it?

A. No, I don't suppose it was.

Q. And the lot claimants, then, following the running of the lines, for these streets and alleys and the lots in this Survey adjusted their lot discrepancies to conform to the Survey?

A. They were in the same, then, they had ever been, in the street; they would try to adjust themselves to one [fol. 206] side of the street or the other?

Q. Yes; did they correct their lot corners or stakes?

A. The Surveyors?

Q. Yes?

A. Yes, they did; they put down a stake for every lot, every twenty-five foot (25′) lot.

Q. Yes, sir; and, they staked the corners on every lot?

A. Every lot.

Q. Well, now, all the lots, at least, as far north as Second Street and beyond Second Street up to Seventh Street were claimed by somebody, just as soon as that Survey was completed, in any event, weren't they?

A. Well —— (interrupted).

Q. Or, virtually all of them?

A. Maybe not all; there were several days in the further western part.

Q. Yes, sir.

A. But, a majority of the lots were obtained, of course, right of ways as the Surveyor went along; everybody did.

Q. Then, when it came to this center railway right of way location, they disregarded that and surveyed and plowed right across it?

A. Yes.

Q. And people went in and "staked" their lots just the same as if the Survey stakes of the right of way were not there?

[fol. 207] A. Yes, sir.

Q. And those lots would remain in the possession of those occupants or somebody else claiming under them, down to now, have they not?

A. Yes, exception, as I say, for awhile, they wouldn't improve them and was afraid of them and were —— (witness interrupted).

Q. Yes; and, they were doubtful about whether their title would stand up?

A. And that controversy just kept the values very unstable there.

Q. Well, beginning within the period within a few days after, when you went in the real estate business, these lots were bought and sold and dealt in just as though they had legal title to them?

A. Well, they wouldn't everybody buy them.

Q. No but there were some who did buy?

A. Well, yes, at a discount.

Q. How would they describe those, now; by lot, somebody would come and take the place?

A. Yes and until after the —— well, our first deed was issued some time in October, 1890.

Q. Yes.

A. And, up until that time, why, we just claimed possessory right.

Q. Yes; and some of them, by deeds?

A. Yes, sir, Quit Claim.

[fol. 208] Q. Just Quit Claim Deeds?

A. Yes, sir.

Q. Well, you did execute them?

A. To the Quit Claim Deeds; yes.

Q. Well, Quit Claim Deeds from one lot claimant to a purchaser?

A. Yes.

Q. Do you know this particular lot involved here, Lot Six (6) in Block Thirty-six (36)?

A. I know where it is.

Q. Did you, at one time, own that and did you sell it to Naoma Noble?

A. No, I sold it for her.

Q. You sold it for her?

A. Yes, sir, I sold it for George Noble.

Q. Yes. Do you recall when they were living there or occupying that?

A. No, when I sold it for her, as I remember, Mr. Noble lived in McAlester and I corresponded with him about it and made the deal.

Q. I see. That was about her deed to the north forty feet (40') of the right of way?

A. Oh, yes; yes, because, as I remember, when I got that deed back from them, together with the Trustees' deed, this Choctaw Scrip was with that deed and I cashed the Choctaw Scrip.

Q. That is, his contribution to the railroad or the pay he got for his right of way?

[fol. 209] A. I think he contributed, in addition to giving that lot, I think twenty-five dollars ($25.00) or something of that kind and he had Choctaw Scrip for it and I got that Choctaw Scrip from them.

Q. Yes, sir.

A. They had other property here; the Nobles had.

Q. Yes, sir. Now, with reference to the controversy that arose later, had the railroad made the terms, Major Shellenbarger or somebody in authority for the Railroad Company, that, if this right of way was acquired between First and Second Street, where you did later acquire it and where the road did later build, that they would accept that abandon that controversy with these lot claimants

or where the right of way is shown on the reverse location?

A. They didn't have to abandon it, I don't think, because, they had their survey took in; the original survey, I think, took that in; as I remember, the Nobles out there took that in, a great deal of this property, it veered a little to the northwest.

Q. Well, all right, it took in some of it but not all; that was so?

A. As I remember, they claimed it didn't do more than to come in.

Q. And they claimed three hundred feet (300') here, as shown by Exhibit 11 introduced, as ground, as well as right of way?

A. Yes; so, they wouldn't be out—they wouldn't be off of their old, original right of way.

[fol. 210] Q. All right. Assuming they were not off of their original right of way, they accepted this right of way between Second and First Street and made no other claim to any other right of way outside of those bounds?

A. No, they did prefer to go through town.

Q. They agreed to do that if you, the Citizens' Committee, would get them this right of way; that right?

A. Yes; yes, sir.

Q. And as far as the fellows who were claiming that the railroad had no right of way, nevertheless, they were within the original plat?

A. No, they claimed that they had a right of way all the time but it was too hard to get the people off of it.

Q. Yes; and these people on there, didn't want to get off?

A. Yes.

Q. They claimed the railroad didn't have that right of way, didn't they; that's what they claimed?

A. Yes.

Q. All right. You did have the claims of the people who were making the claim that they owned the lots and the railroad took them; that right?

A. Yes.

Q. Do you recall, whether or not, the railroad then made public announcement that, for all purposes, it might not be best, that they would build the road north, three (3) miles north of town if the right of way wasn't obtained through town for them?

[fol. 211] A. There was something of that talked of but I never paid any attention to it; I didn't think there was anything to it.

Q. Yes, sir; it was just talked of?

A. Yes.

Q. In the newspapers, wasn't it?

A. Well, I don't know; I expect—I guess the newspapers did have it mentioned some but I never took it seriously; I don't know of any of it being written.

Q. Do you have any knowledge of whether or not the Railroad Company filed contest in the Land Office against the Entry of this quarter section of the townsite, with the townsite trustees?

A. My understanding was that they had filed their Maps and Profiles at the Land Office in October.

Q. Yes, but, I mean, a contest of the right of the persons to make Entry of this quarter section of land in the Land Office, just the contest in the Land Office of the Railroad Company?

A. No, I don't know about that.

Mr. Garnett: That's all.

Mr. Hull: I think that's all, Mr. Owen.

Witness excused. (CM 328-344.)

[fol. 212] Defendant introduced in evidence as Exhibit 19 a contract between the Choctaw, Oklahoma & Gulf Railroad Company and its lessee the Chicago, Rock Island & Pacific Railway Company, and the St. Louis-San Francisco Railway Company, on the one hand, and the City of Oklahoma City on the other hand, for the purchase by the latter of the land involved in these cases and other land for a consideration of $4,000,000, which contract was later performed by payment of the consideration named and the execution and delivery of the deeds provided for (C. M. 405-412). The deed from the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company to the City conveying the land involved in both of these cases and other lands was introduced in evidence in each case by the plaintiff. See page 86 supra and page 297 infra.

Defendant introduced in evidence as Exhibit 23 a certified copy of a letter from the Commissioner of the General Land Office to the Register and Receiver at Guthrie, Oklahoma, under date of October 14, 1889. The letter is as follows (C-M. 539-541):

EXHIBIT 23

"Department of the Interior, General Land Office

Washington, D. C. Oct. 14, 1889.

"Register and Receiver,
Guthrie, Indian Ter.

"Gentlemen: Your are advised that on Sept. 18, 1889, the Hon. Secretary of the Interior approved a plat fixed by the Choctaw Coal Railway Co. showing a tract selected by said company for station purposes, situated in the S½ Section 33 Town. 12 N. Range 3 W. Oklahoma, containing [fol. 213] 13.77 acres. Said plat is approved under act of February 18, 1888, and is subject to all the conditions and limitations imposed by said act.

"I transmit herewith a copy of said plat upon receipt of which you will proceed under the usual instructions in such cases.

"Very respectfully, Lewis A. Groff, Commissioner."

In the certificate by the President of the Choctaw Coal and Railway Company, attested by its Secretary, to the plat attached to the foregoing letter appears the following statement:

"That the Company has selected no other grounds, upon public or Indian lands for similar purposes within the section of ten miles for which this selection is made, and that the Company by resolution of its board of directors passed on the 25th day of June, 1889, directed the proper officers to present said plat for the approval of the Secretary of the Interior in order that the Company may obtain the use of the grounds described under said Act approved February 18, 1888, and the Act of March 3rd, 1875."

The station grounds shown on the plat referred to in the above letter are the same as shown on the map at page 158 supra and marked "Station" thereon.

It was stipulated by counsel that Halifax Station mentioned in the Act of February 13, 1889, was located where the present town of Goodwin is on the Santa Fe Railroad in Ellis County, Oklahoma, and that Tobucksey County in the Choctaw Nation mentioned in that act, was approximately the present location of Hartshorne or Haileyville, in Pittsburg County, Oklahoma.

[fol. 214] Defendant rested its case (C-M. 414).

In rebuttal plaintiffs introduced a copy of the bill passed by Congress entitled:

"A bill to authorize Oklahoma City, in Oklahoma Territory, to issue bonds to provide right of way for the Choctaw Coal and Railway Company through said city." (C. M. 415-416.)

Also the report of the Committee on Territories of the House of Representatives made on December 11, 1890, reporting out the bill for passage (C-M. 416-418). The pertinent part of this committee report is as follows:

"The bill provides for the issue of bonds by Oklahoma City for the purpose of providing a right of way for the Choctaw Coal and Railway Company through said City. The bonds are made payable in not less than ten or more than twenty years, at 5 per cent per annum, and are not to exceed in amount the sum of $40,000.

"It appears from the facts presented to the committee that the Choctaw Coal and Railway Company, to which a right of way has been granted by act of Congress to construct its road through the Indian Territory, was located diagonally across the present townsite of Oklahoma City, previous to the settlement on said site on the 22nd of April, 1889.

[fol. 215] "Under the decision of the Supreme Court of the United States in what is claimed to be a parallel case (U. S. 103, p. 426), the railroad company claims that it has a superior title to the right of way through said city, though the ground claimed was at once platted into lots and blocks by the townsite settlers immediately after 12 o'clock m. on the 22nd of April, 1889, and has been mostly covered with substantial improvements, consisting of business houses, hotels, private residences and manufacturing establishments.

"It appears that these townsite settlers believed, and were so advised, that the rights of the railroad did not attach until the map of definite location was filed in the department of the interior, which did not occur until the 13th of July 1889. In this state of affairs it is found to be impossible to adjust the controversy between the railroad company and the townsite settlers, without such delay in litigation as will defeat the construction of the road within the time required by law.

"As a practical solution of this difficulty, and with the unanimous consent of the people of the city, it has been agreed between the city authorities and the railroad company that the road may pass directly through the city on regular surveyed lines, corresponding to the streets and alleys, and it is for the purpose of paying for the property necessary to be purchased that this legislation is asked.

"The road is now in course of construction and will soon be up to the city limits.

"The committee recommend the passage of the bill."

(House Reports, 51st Congress, Vol. 1, Report No. 3279.)

Plaintiffs introduced pages 1079 et seq. of the Congressional Record, Part 2, Vol. 22, 51st Congress, Second Session, showing the proceedings of the House of Representatives on Friday, January 9, 1891, with respect to debate on the bill in question (C-M. 420-430). The pertinent part of this debate is as follows, Mr. Harvey being the delegate in Congress from Oklahoma Territory:

"Mr. Harvey: Mr. Speaker, ever since the town of Oklahoma City was started there has been a controversy between the people of that city and this railroad company. Under the decision of the Supreme Court, the railroad com- [fol. 216] pany is now entitled to a right of way through the city 300 feet wide, running through the business and residence portion of the city, which is entirely built up. The object of this bill is to adjust the right of way difficulty with the railroad company, to give them a street and two blocks of land in lieu of the right of way which they are to surrender. The persons owning the property surrendered, who are to be benefitted by this adjustment, are to contribute in part, and the general public in part. If this arrangement is not carried out, the railroad company,

under the decision of the Supreme Court of the United States, can tear through the improvements and mutilate the city in a way that we do not want to have done. This is a matter that could be arranged in any city in the gentleman's district by a meeting of the city council in half an hour, but we are compelled to come to Congress for it.

"Mr. Anderson of Kansas: I would like to inquire of the gentleman whether these bonds authorized in this bill are to be given to the railroad company or the owners of this property.

"Mr. Harvey: The bonds are to be given to the owners of the property to compensate them for the loss of their improvements. The railroad is to have nothing whatever to do with the handling of this money. It is not for the purpose of paying the railroad company; it is to pay the parties whose improvements are taken for the new right of way.

"Mr. Anderson of Kansas: How long has that city been there and what is its population?

"Mr. Harvey: It is about two years old. The population is about 6,000.

"The Speaker: Is there objection to the present consideration of this bill? (A pause.) The Chair hears none.

"Mr. Cannon: Mr. Speaker, as there is no objection, I would like to know the amount of these bonds that are proposed to be issued.

"Mr. Harvey: Not to exceed $40,000, whatever amount is necessary to pay the owners of property whose improvements are taken in this way. That is what the money is intended for, and it is to be used for no other purpose but to compensate these parties for the loss of their improvements. It is not to go to the railroad company at all. It will take about $75,000 altogether to pay for these improvements, but part of it is to be met by individuals.

[fol. 217] "Mr. Cannon: In other words, it is proposed to give this railroad company a right of way through this city and to bond the city to pay for it?

"Mr. Harvey: No sir; nothing of the kind. The railroad company already has a right of way running in an angling direction through the city. The Supreme Court has held that the right of way has attached, and the railroad company has not the right to enforce it.

"Mr. Anderson of Kansas: How did the railroad company acquire this right of way?

"Mr. Harvey: By an act of Congress.

"Mr. Struble: Mr. Speaker, this bill was reported from the Committee on Territories by the gentleman from Ohio (Mr. Morey), and I think it might be well for the House to hear him on this subject.

* * * * * * *

"Mr. Morey: Mr. Speaker, this Bill comes before the House upon a unanimous report of the Committee on Territories. It authorized the City of Oklahoma to issue bonds not exceeding $40,000 in amount for the purpose of adjusting the right of way of the Choctaw Coal and Railway Company through the City of Oklahoma. It seems that this railway company, under a grant from the Congress of the United States, had laid its route diagonally over the territory now occupied by the City of Oklahoma, but it had not been definitely surveyed or established.

"Mr. Anderson of Kansas: When was this grand made and had the company located its line prior to the establishment of the city?

"Mr. Harvey: It had been located.

"Mr. Morey: Prior to the founding of the City of Oklahoma, the route had been laid out, but had not been definitely surveyed, and under a decision of the Supreme Court that the company's right attached——

"Mr. Anderson of Kansas: Had any location whatever been made?

"Mr. Morey: It is held under the decision of the Court that the right of the company attached where the route finally should be located and surveyed.

"Mr. Anderson of Kansas: But had the company surveyed and located any line whatever?

[fol. 218] "Mr. Morey: I understand not.

"Mr. Anderson of Kansas: Then, this is a 'game of grab' on their part.

"Mr. Morey: Under the decision of the Supreme Court it is held that the right attached to the route which may be finally located by the railroad company.

"Mr. Harvey: If the gentleman will permit me, the fact is that the survey had been made, but no report filed with the interior department of a definite location. The line was marked through the city.

"Mr. Anderson of Kansas: Had stakes been driven and the line marked?

"Mr. Harvey: Yes, sir.

"Mr. Morey: Under this state of facts parties went on and selected lots. The laying out of the city was completed. Lot occupants have erected improvements upon their lots and now a conflict arises between such occupants and the railroad company. The route as finally located would go diagonally through the City of Oklahoma. The delagate from that territory (Mr. Harvey), who resides in the City of Oklahoma, comes here and shows that it is the wish of the people of the city that this matter be adjusted between the railroad and those who have improved these lots without litigation and by giving to the railroad company a straight line instead of a diagonal line through the city.

"Mr. Oates: Does this Bill authorize the City of Oklahoma to issue bonds for the purpose of adjusting the right of way through that city?

"Mr. Morey: That is the purpose. This Bill authorizes the City of Oklahoma to issue bonds to the amount of $40,000, for the purpose of adjusting this right of way.

"Mr. Oates: The Government of the United States will not endorse these bonds or be at all liable for them?

"Mr. Perkins: Not in any way.

"Mr. Oates: All right.

"Mr. Anderson of Kansas: I would like to know what was the width of this original right of way?

"Mr. Morey: I am not able to answer.

"Mr. Harvey: Three hundred feet.

[fol. 219] "Mr. Morey: The object of this Bill is to do away with the right of way claimed by the company and to purchase another right of way which will be more convenient to the city by creating less obstruction, and will at the same time settle this controversy between the railroad company and the owners of these lots.

"Mr. Anderson of Kansas: I wish to ascertain one fact in this connection. As I understand from my friend who stands beside me (Mr. Harvey) the right of way granted to the company under the Act of Congress has a width of 300 feet. According to the statements made here, the company, under a decision of the Supreme Court can claim right of way for 300 feet through that city. Now, what is the proposition which the company makes as to the width

of the right of way which they will take provided this Bill becomes a law?

"Mr. Morey: The proposition, as I understand, is this: That the railway company shall surrender its claim to the original right of way and accept another suitable and adequate right of way, to be secured by the use of these bonds, which will not exceed in amount $40,000.

"Mr. Anderson of Kansas: This new right of way, I am informed, is to be 80 feet wide.

"Mr. Harvey: Yes, sir, running along a street.

"Mr. Anderson of Kansas: Anything else?

"Mr. Harvey: And for depot purposes the company proposes to acquire two blocks of ground now covered with buildings, which we propose to remove.

"Mr. Anderson of Kansas: In this Bill, then, the company obtains a compromise under which the right of way 300 feet wide will be surrendered?

"Mr. Harvey: They surrender all claim to that right of way.

"Mr. Morey: I will only add, Mr. Speaker, that this proposition, before finally taking effect, is to be submitted to a vote of the people of Oklahoma City. (Cries of vote! vote.) The question being taken, the amendment to the amendment was agreed to, and the amendment as amended was adopted. The Bill as amended was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time and passed.

"Mr. Morey: Moved to reconsider the vote by which the Bill was passed; and also moved that the motion to reconsider be laid on the table.

[fol. 220] "The latter motion was agreed to." (C-M. 422-429.)

Plaintiffs introduced the veto message of President Harrison upon returning the bond bill to the House of Representatives without his approval. Congressional Record, Volume 22, Part 2, 51st Congress, Second Session, pages 1873-1874. This message is in full as follows:

"To the House of Representatives:

"I return herewith, without my approval, the Bill (H. R. No. 12365) entitled:

"'An Act to authorize Oklahoma City, in Oklahoma Territory, to issue bonds to provide a right of way for the

Choctaw Coal and Railway Company through said city.' This bill authorizes the corporation of Oklahoma City to issue corporate bonds to the amount of $40,000, for the purpose of providing a right of way for a railroad company through the city, if the proposition shall receive the assent of the majority of the legal voters at an election to be called for that purpose.

"It is attempted to distinguish this case from the ordinary case of a municipal grant to a railway company by the fact that this railway had located its lines through the land afterwards settled upon under the townsite law before such settlement, and that the route thus located cuts the plat of the city diagonally and in a way to be very injurious to property interests.

"Upon an examination of the facts, it appears to me to be clear that no legal location was made by the railway company prior to the acquisition of the land by occupying settlers. Some preliminary surveys had been made, but no map of location had been filed with the Secretary of the Interior. If the rights of this company at this point of its road as to the right of way, are derived from the general statutes of the United States upon that subject (Revised Statutes, supplement page 187), then Section 4 distinctly saves the right of any settler who had located prior to a filing of the profile of the road and the approval by the Secretary of the Interior thereof. And, if, on the other hand, the rights of the company at the point indicated were derived from the Act of Congress of February 18, 1888, 'to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory and for other purposes' Section 6 of that Act plainly protects the right of any occupying claimant. The latter statute, it seems to me, was intended to grant a right of way [fol. 221] only through Indian lands, and if these lands were not such, the general statute to which I have referred would apply; but in either event the conclusion is the same.

"It appears from the report of the committee that its favorable action, and I must assume, the favorable action of Congress, proceeded upon the theory that there was a real controversy, doubtful as to its issue, as to the right of the railroad company to hold the line of its survey through the city. Stripped, then, of this claim, the proposition is nakedly one to authorize Oklahoma City to donate

$40,000 to the Choctaw Coal and Railway Company. The general statutes of the United States prohibit such grants, and this must stand, until repealed, as a continuing expression of legislative opinion. If a departure from this rule is allowed at all, certainly it should only be where the circumstances are exceptional. Such circumstances, in my opinion, do not exist in this case. Already I have received from other cities in the territory, protests against special legislation of this sort, accompanied by the suggestion that if this policy is admitted other cities shall also be allowed to encourage the building of roads by donation.

"Oklahoma City, according to the report of the census office, has a population of about 4,100, and this donation would be equivalent to nearly $10 per capita. Very little real estate, whether townsite or country property, in this territory is yet subject to assessment for taxation. The people have not yet had time to accumulate, and Congress has received appeals for aid to relieve a prevailing distress which the territorial authorities have found themselves unable to deal with. It does not seem to me, in view of all these facts, that the wholesome rule prescribed by the general statutes should be departed from.

"Executive Mansion, January 26, 1891.

"Benj. Harrison." (C-M. 431-434.)

Upon receipt of the veto message by the House of Representatives it was referred with the bill to the Committee on Territories (C. M. 434-438) and died there.

Plaintiffs introduced the oral testimony of W. H. Ebey.

He now lives at Ada, Oklahoma. On April 22, 1889, he arrived in Oklahoma City at 2:05 p. m. on the first train in from the south. He first staked a lot right on the corner of [fol. 222] Grand Avenue and Santa Fe Streets, then went on up Broadway to the hill, where the Baptist Church at Third and Broadway was afterward located, and staked a lot west of there, between Broadway and Robinson. He was not over 10 or 15 minutes getting up there after he got off the train. There was an immense crowd all over the townsite staking lots. All of the lots in the townsite were staked that day. In a few days some of the citizens gathered together and discussed the matter of a government, and the general opinion was that some form of government should be established and upheld. So a regular election was held, and city officials, consisting of mayor, recorder,

city attorney, etc., were elected. This was a purely voluntary organization without any authority of law, but it was acquiesced in by the people. Under this city government provision was made for recording transfers of platted property. J. C. Blackburn, as city recorder, issued certificates to the occupants of lots on the townsite and transfers of lot rights were made by quit-claim deeds and lot certificates, which were filed for record in the city recorder's office. A plat of the townsite was filed in this office. This was the Chamberlain survey, also known as the Seminole survey, from the alley between Grand Avenue and Main Street to the north line of the quarter section at Seventh Street, and was the one later adopted by the townsite trustees appointed under the townsite act of 1890. From the alley between Grand Avenue and Main Street to the south other surveys were adopted (C-M. 439-444).

[fol. 223] He was familiar with the controversy between lot claimants and the Choctaw Railway Company over which had prior right to the right of way as surveyed and staked by the company before the opening, and as secretary of a citizens board, organized similar to a chamber of commerce, he took the matter up with Mr. Chadick, general manager of the company. The company wanted to go through the alley between First and Second Streets and take 40 feet off the back end of each side, but except for a few public spirited men the lot owners were unwilling and refused to give up any of their ground. They wouldn't budge and wouldn't do anything, and it finally resulted in the citizens raising a fund to reimburse the occupants of those lots for the ground that was needed for that right of way.

The company's proposition was to have a right of way 100 feet wide down the alley between First and Second Streets, with 40 feet off the back end of each of the lots on each side, and the citizens undertook to acquire that for them and did so. They worked with Mr. Chadick to get the line through on that alley. He was worried quite a bit about getting through and didn't want to miss the town, but wanted to go through it if he could, and so agreed to accept that right of way if the citizens could get it for him, and they proceeded to raise the money and pay the lot owners who demanded payment for their deeds. The citizens obtained a donation of the necessary ground for the right of way where they could get it, and bought it from those who would not donate. In an endeavor to rush the matter a bond

[fol. 224] was prepared and signed by a number of citizens, including the witness, guaranteeing payment to the lot owners of all damages for the taking of their land for a right of way, the amount to be determined by arbitrators or by commissioners in condemnation proceedings. The citizens on the lots covering the proposed right of way did not take the company's claim to a right of way very seriously, didn't pay any attention to it, and didn't think the company had any legal rights at all. The principal ground on which they based their denial of any right in the company was that no map of definite location of the proposed right of way had been filed as the law required before they took their lots (C-M. 444-440).

Plaintiffs introduced the oral testimony of Dr. A. C. Scott.

He lives in Oklahoma City and has since April 22, 1889. He arrived at Oklahoma City in an official capacity by train shortly after midnight on April 22, 1889. He was familiar with the Chamberlain townsite survey and understood that it had already been made and a blue print plat prepared prior to the opening. At noon on that day Mr. Chamberlain began to run the lines and drive stakes and lay out the plat on the ground. He surveyed and staked the lots, blocks, streets and alleys as they now exist in Oklahoma City north of the alley between Main Street and Grand Avenue, just as Mr. Ebey had testified. This plat was the one later adopted by the townsite trustees. South of that alley other surveys were approved. These different surveys were first approved by various committees and citizens' meetings. [fol. 225] The witness was chairman of the first two public meetings held in the city. He was later appointed a member of the board of townsite trustees, being appointed late in 1890 or early in 1891, succeeding Edgar N. Sweet (C-M. 450-455).

He was familiar with the controversy that existed from the opening until in 1891 between lot claimants and the Choctaw Railway Company as to its claim of a right of way. Delegate Harvey introduced a bill in Congress authorizing the city to vote $40,000 in bonds to pay for a right of way through the city, and it passed Congress, but was vetoed by President Harrison early in 1891. The right of way as proposed to be purchased with this fund was located along the alley between First and Second Streets, and

parallel to the boundary lines of those streets. After the bill was vetoed the people undertook, with the consent of the railway company, to raise by public subscription the money necessary to pay for the ends of the lots needed on each side of the alley, which was somewhere between $20,000 and $30,000. The witness, with others named, were members of the soliciting committee and at a meeting in March, 1891, found they had collected a little over $11,000. It seemed impossible to collect more and a proposition was made that the saloon licenses be raised as high as the traffic would bear and half of this paid into the railroad right of way fund. But to get the money in this way would require several months, so scrip was issued against it, which floated immediately almost at par. To secure this and give it standing what was called the Choctaw bond was made and signed by a number of citizens guaranteeing the payment of it. [fol. 226] There were 157 persons signed this bond, including nearly every substantial citizen in town. By reason of the scrip being receivable in payment for half of a saloon license and secured by the Choctaw bond it floated near par and in that way the citizens raised the rest of the amount necessary to pay the owners for the portions of their lots taken. The prices or damages to be paid were fixed by a committee of appraisers whose report was made the basis of settlement with the lot owners. The witness was on the soliciting committee for funds, but not on the railroad committee proper and did not know what agreement was reached between that committee and the company, but did know that the railroad was built through on the right of way that the citizens acquired for it. He was acquainted with T. C. Sears, attorney for the railroad (C-M. 450-461).

On cross-examination counsel for defendant read from an Oklahoma City newspaper, dated January 9, 1890, a part of what purported to be a report of a citizens' committee of which the witness was a member, stating that Mr. Chadick of the Company had been interviewed and had said that any modification of the located right of way would be impracticable, and:

"That the company was advised by eminent lawyers, and among them Ex-Governor Fletcher of Missouri, that the right of way through Oklahoma City is perfectly valid; that they do not claim under any general law, but under the special Act of Congress of 1889; that said Act is a grant in præsenti; that it attached on the locating of the right

of way by survey and not at date of filing plat with the Secretary of the Interior, said filing when made relating back to the time of locating the line of survey."

[fol. 227] Witness said that was a correct statement of their report and of Mr. Chadick's position as he remembered it (C-M. 462).

On re-direct examination witness said that while the matter just read was a correct statement of the company's contention, on the other hand the lot claimants contended that the Act of Congress was not a grant in præsenti and that the company's right would not attach until it had filed its location map and that their rights were prior and superior to its right (C-M. 463).

This closed the oral testimony.

Plaintiffs introduced a certified copy of letters patent from the United States to the Muskogee or Creek Tribe of Indians, dated August 11, 1852, and recorded in Volume 4 of Records of Indian Deeds, in the office of Indian Affairs, pages 446-447 (C-M. 464-467), which conveyed the territory described in the treaty with the Creeks of February 14, 1833.

Plaintiffs introduced the court files in case No. 212, begun on April 7, 1891, in the District Court of Oklahoma County, Territory of Oklahoma, entitled "In the Matter of the Condemnation of a Right of Way by the Choctaw Coal and Railway Company." It was stipulated by counsel that the petition in this condemnation proceeding was missing from the files, and counsel on each side had been unable to locate it, and that when counsel for defendant first saw the files, about three years prior, there was no petition in them at that time, and that apparently it had been lost (C-M. 470).

These court files begin with a motion and affidavit for service by publication upon certain defendants (C-M. 471), [fol. 228] made by T. C. Sears, attorney for the Choctaw Coal and Railway Company, reciting that the persons named therein were property owners, as indicated in the petition filed, on the right of way designated by said company through the City of Oklahoma City, and that they were non-residents and personal service could not be had upon them in the Territory of Oklahoma.

The files show that the case proceeded to the point where commissioners were appointed to assess damages to the lot

owners and that these commissioners made a series of reports, in which they listed the description and quantity of land to be taken, the name of the owner and amount of damages awarded. The lots crossed by the right of way as actually taken are included in this list. A part of this exhibit consists of a statement of account by the court clerk showing the amounts of money deposited with him and the amounts paid out in the proceeding. A recapitulation of this account under date of July 24, 1891, shows the amount deposited by citizens to the credit of the clerk, the amount checked out for deeds and services, and the balance then on deposit to the credit of the clerk. (C-M. 525-527.)

These condemnation proceedings were duly instituted and carried to the point of the assessment of damages by commissioners and then right of way deeds in the form already set forth herein were obtained from the lot owners who were either paid therefor directly by the citizens' committee or were paid out of funds deposited by the committee with the court clerk for that purpose.

[fol. 229] The plaintiffs rested in rebuttal (C-M. 537).

Both sides rested and the evidence was closed (C-M. 542).

Thereupon the case was argued orally to the court and written briefs were submitted and the court took the matter of his decision and judgment therein under advisement. (C-M. 546.)

And thereafter on the 9th day of January, 1932, the case again came on for decision and judgment of the court and thereupon the court announced and rendered a decision and judgment for the defendant. (C-M. 547.)

And thereafter, on the 11th day of January, 1932, there was filed in said cause, by the Court Clerk of said Court, a "Motion for New Trial"; a full, true and correct copy of the same, together with all endorsements on the back thereof, being in words and figures as follows, to-wit:

[fol. 230] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Jan. 11, 1932

Come now the plaintiffs in the above entitled action and move and ask the court to vacate and set aside the former

decision of the court made and rendered in this action on the 9th day of January, 1932, and to grant these plaintiffs a new trial of this action for the following causes which affect materially their substantial rights.

1. For irregularity in the proceedings of the court and of the defendant and for abuse of discretion on the part of the court by which the plaintiffs were prevented from having a fair trial.

2. For misconduct of the defendant.

3. For accident and surprise which ordinary prudence on the part of the plaintiffs could not have guarded against.

[fol. 231] 4. For that the said decision of the court is not sustained by sufficient evidence.

5. For that the said decision of the court is contrary to law.

6. For newly discovered evidence material to these plaintiffs which they could not with reasonable diligence have discovered and produced at the trial.

7. For error of law occurring at the trial and excepted to by these plaintiffs at the time.

(Signed) Henry L. Goddard, (Signed) Fred Ptak,
(Signed) Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 232] And thereafter on the 21st day of January, 1932, the cause again comes on for hearing on the motion of the plaintiffs for a new trial, and the court, having heard the argument of counsel thereon and considered the same, orders that said motion be overruled, to which the plaintiffs except and in open court give notice of appeal to the Supreme Court and ask and are given time in which to make and serve case-made for their appeal (C-M. 550).

And thereafter on the 23rd day of January, 1932, there was filed in the cause and recorded on the journal of the court the decision and judgment of the court and its order

overruling plaintiffs' motion for new trial and allowing their appeal and a record of the proceedings for such appeal all in the words and figures as follows, to wit (C-M. 551-556):

[fol. 233] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

JOURNAL ENTRY OF JUDGMENT—Jan. 23, 1932

On the 14th day of September, 1931, being one of the regular court days of the September, 1931 term of this court, this cause comes on for trial in its regular order. The plaintiffs appear in person and by Henry L. Goddard, Fred Ptak and Chas. H. Garnett, their attorneys. The defendant appears by Albert L. McRill, its Municipal Counselor, and A. L. Hull, its Assistant Municipal Counselor. Both plaintiffs and defendant announce ready for trial.

Thereupon, trial by jury is waived in open court and all parties consent and agree that the court shall try the cause and make decision and render judgment therein without the intervention of a jury.

Thereupon, the trial is begun and all the evidence on the part of the plaintiffs and defendant, respectively, is intro-[fol. 234] duced and the argument of counsel is heard, and at the conclusion thereof, the court takes under advisement the matter of decision and judgment.

On the 9th day of January, 1932, being one of the regular court days of the January 1932 term of this court, this cause again comes on for decision and judgment by the court. The parties appear as upon the trial.

Thereupon, the court, having heard all the evidence and the argument of counsel, and being fully advised in the premises, announces and makes decision and judgment in the case.

The Court finds the issues for the defendant and finds that judgment should be that the plaintiff take nothing by the action and that the defendant have judgment for its costs, and judgment on its cross-petition.

The Court holds, as a matter of law, that the Act of Congress of February 18, 1888 (25 Stats. 35) together with the Acts amendatory thereof, was a present absolute grant of the land here involved for right of way and station grounds

to the Choctaw Coal and Railway Company, vesting the fee title to said land in said Company immediately upon the enactment and approval of said Act, with a possibility of reverter in the United States; and that the patent purporting to convey to the township trustees named therein the whole of the Southeast Quarter (SE ¼) of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West, of the Indian Meridian, was ineffective to convey to said trustees any title to the land within the boundaries of the right of way of said Company across said quarter [fol. 235] section as and when located and that, therefore, the said right of way having been located in conformity to said Act, so as to include all the land involved in this action, neither the plaintiffs, nor any persons through whom they claim to have derived title under said patent, now have, or have ever had, any sort of right or title whatsoever to said land.

The Court holds further, as a matter of law, that the land included within the boundary lines of said right of way, as the same should thereafter be and was thereafter located, was, by the Act of Congress aforesaid, appropriated to a lawful use and thereby severed from the public domain of the United States, and was never thereafter subject to preemption, homestead or townsite entry, and that the Land Department of the United States had no authority, after the enactment of said Act, to grant any title to said land to any person.

The Court further holds, as a matter of law, that upon abandonment for railway purposes of said land within the boundaries of said right of way and station grounds, title to said land revested in the United States, and upon entry of the decree of the United States District Court for the Western District of Oklahoma finding such abandonment, that the title to said land immediately vested in the City of Oklahoma City, a municipal corporatiion, by virtue of the Act of Congress of March 8, 1922 (42 Stats. 414).

It is, therefore, considered, ordered and adjudged by the court that the plaintiffs take nothing by this action, and that their petition here be, and it is hereby dismissed and that all costs of the action be, and they are hereby taxed and adjudged against the plaintiffs.

[fol. 236] It is further considered, ordered and adjudged by the Court that the City of Oklahoma City, a municipal

corporation, is vested with the absolute fee simple title to the land involved in this action described as follows:

Forty (40) feet off the north end of Lot No. Six (6) in Block No. Thirty-six (36) in the original townsite of said city of Oklahoma City, according to the recorded plat thereof, and a strip of land ten (10) feet wide across and adjoining the north end of said Lot Six (6), being one-half (½) of the alley twenty (20) feet wide extending east and west through said block as laid out, and designated on said plat, where and as the said alley adjoins the north end of said Lot Six (6), subject only to the reservations contained in the Act of Congress of March 8, 1922, aforesaid (42 Stats. 414) and that such title be, and the same is hereby fully quieted in said City as against the plaintiffs herein, and all persons claiming by, through ot under said plaintiffs; and that said plaintiffs and all persons claiming by, through or under said plaintiffs, or either of them, are forever barred and enjoined from asserting claim to any title or interest to or in said land, or any part thereof.

To all of which findings, decision and judgment of the Court the plaintiffs at the time excepted, and their exception is allowed.

Thereafter, and on the 11th day of January, 1932, the plaintiffs filed herein their motion for new trial in writing. And now on this 21st day of January, 1932, the said motion of the plaintiffs for new trial comes on for hearing in its regular order. The parties appear as upon the trial of the action.

[fol. 237] Thereupon, the Court considers said motion, and having heard the argument of counsel thereon, and being fully advised in the premises, finds that the same should be overruled and denied.

It is therefore considered, ordered and adjudged by the Court that the motion of the plaintiffs in this action for new trial be, and the same is hereby overruled and denied.

To all of which findings, decision and order of the Court overruling their said motion for new trial the plaintiffs at the time except and their exception is allowed.

Thereupon, the plaintiffs give notice in open court of appeal to the Supreme Court of the State of Oklahoma from the said findings, decision, judgment and orders of the Court in this action, and requests the Court to order

and direct the Clerk to enter their said notice of appeal upon the journal and trial docket of the Court.

Thereupon, it is considered and ordered by the Court that the Clerk of this Court be, and he is hereby ordered and directed to enter of record and to spread upon the trial docket and journal of this Court the said notice of appeal of the said plaintiffs in the manner provided by law.

Thereupon, the plaintiffs request an extension of time in which to make and serve case-made for appeal herein. And the Court finds that for good cause shown, the time fixed by statute for making and serving case-made for appeal herein should be extended to sixty days from this date.

It is, therefore, considered and ordered by the Court that the plaintiffs herein be, and they are hereby granted sixty days from this date in which to make and serve case-made [fol. 238] for appeal herein, and that the defendant be, and it is hereby granted three days thereafter in which to suggest amendments thereto, and that the same may be settled and signed upon three days' notice in writing by either party.

(Signed) Lucius Babcock, Judge.

O. K.: (Signed) Chas. H. Garnett, Attorney for Plaintiffs.

O. K.: (Signed) A. L. Hull, Asst. Municipal Counselor, Attorney for Defendant.

[File endorsement omitted.]

[fol. 239] Thereafter a casemade for appeal in said cause was duly prepared, served, settled and signed, filed in the trial court, withdrawn, attached to a petition in error and filed with said petition in error in the Supreme Court of Oklahoma, all in the time and manner provided by law, the said petition in error being as follows, towit:

[fol. 240] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23821

GEORGE NOBLE and WILLIAM NOBLE, Plaintiffs in Error,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendant in Error

PETITION IN ERROR—Filed July 6, 1932

The Plaintiffs in Error, George Noble and William Noble, complain of the Defendant in Error, the City of Oklahoma City, a municipal corporation, that it recovered a judgment in the District Court of Oklahoma County, in the State of Oklahoma, against the plaintiffs in error above named in a cause pending in said court wherein the said plaintiffs in error were plaintiffs, and the said defendant in error was defendant, and being cause No. 66,726, in said court, at the January, 1932, Term of said court, on the 9th day of January, 1932, and for that the said court on the 21st day of January, 1932, and at the same January, 1932, Term, denied and overruled the motion of the said plaintiffs in error to vacate and set aside said judgment theretofore recovered by the said defendant in error in said action and to grant the said plaintiffs in error a new trial in said action.

To all of which judgment, order and action of said court the plaintiffs in error reserved exceptions, and in all of [fol. 241] which there was manifest error on the part of said court.

And upon the over-ruling of their said motion for new trial as above stated, the plaintiffs in error gave notice in open court of appeal to the Supreme Court of the State of Oklahoma from the said findings, decision, judgment and orders of the court in the said action, and requested the court to order and direct the clerk to enter their said notice of appeal upon the journal and trial docket of the court, and thereupon the court did so order.

And now the original casemade of the proceedings of said court in said cause, duly served, signed, certified,

attested and filed in said court in said cause, is hereto attached, marked Exhibit A, and made a part of this petition in error.

The said plaintiffs in error aver that there was and is manifest error in the proceedings had by said court in said cause and in the said judgment and orders made and entered therein in this, towit:

1. That the order and judgment of the said court denying and over-ruling the said motion of plaintiffs in error for new trial was and is erroneous and contrary to law.

2. That the findings, decision and judgment of the court in said cause was and is erroneous because not supported by the evidence.

3. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the evidence.

[fol. 242] 4. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the law.

5. That the said court erred in not rendering judgment upon the trial of the cause for the plaintiffs in error as prayed for by them.

6. That the said court erred in that its said decision and judgment are not supported by, but are contrary to, its findings of fact.

7. That the said court erred in admitting incompetent, irrelevant and immaterial evidence upon the trial on behalf of the defendant in error, over the objection of the plaintiffs in error.

8. That the court erred in excluding competent, relevant and material evidence offered on behalf of the plaintiffs in error upon objection by the defendant in error.

Wherefore, the plaintiffs in error pray that the said order and judgment of the court made and rendered on the 21st day of January, 1932, over-ruling and denying their said motion to vacate and set aside the said judgment rendered therein on the 9th day of January, 1932, and to grant them a new trial in said action, be reversed, set aside and held for naught, and that the said judgment rendered on the 9th

day of January, 1932, against the said plaintiffs in error also be vacated, reversed, set aside and held for naught, and that the said court be ordered, directed and commanded to enter judgment in said cause for the plaintiffs in error for the relief prayed for in their petition in said [fol. 243] cause, or to grant the plaintiffs in error a new trial upon the issues joined in said cause.

Henry L. Goddard, Fred Ptak, Chas. H. Garnett,
Attorneys for Plaintiff in Error.

[fol. 244] At this stage of the record and proceedings in the case of Nobel et al., vs. City of Oklahoma City, No. 23,821, in the Supreme Court of Oklahoma, it was consolidated with the case of Higgins et al. vs. City of Oklahoma City No. 23,822, in said Court, and the further record and proceedings in it is a consolidated record and proceedings in the two cases. The record and proceedings in the Higgins case down to its consolidation with the Noble case follows here.

[fol. 245] Pleadings and Proceedings in the District Court of Oklahoma County, in the State of Oklahoma, in the case of Robert W. Higgins, Jr., John T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, plaintiffs, vs. The City of Oklahoma City, a municipal corporation, defendant, No. 66,314, and in the same case in the Supreme Court of the State of Oklahoma, in which the plaintiffs above named were plaintiffs in error and the defendant above named was defendant in error, being No. 23,822 in said court.

[fol. 246] [Caption omitted]

[fol. 247] STATE OF OKLAHOMA,
Oklahoma County, ss:

IN THE DISTRICT COURT IN AND FOR THE SAID COUNTY AND STATE

No. 66314

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, His Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Plaintiffs,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendant

PETITION—Filed Dec. 5, 1930

Come now the plaintiffs above named and for their cause of action against the defendant above named allege and say:

1. That the plaintiffs other than Eva H. McMillan and Fairy Adkins are children of Robert W. Higgins, Sr., now deceased, and the said plaintiffs Eva H. McMillan and Fairy Adkins are grandchildren of the said Robert W. Higgins, Sr., being the children and sole and only heirs of William H. Higgins, deceased, who died intestate in Oklahoma County, in the State of Oklahoma, on or about June 6, 1925, and who was a son of said Robert W. Higgins, Sr., and that the plaintiffs are all and the only de-
[fol. 248] scendants and heirs of the said Robert W. Higgins, Sr., deceased; that the said Robert W. Higgins, Sr., died intestate on or about the 18th day of June, 1916, in San Diego County, in the State of California, and no administration has ever been had on his estate; that the plaintiff Cass W. Higgins is insane and an incompetent person and one Jack Jones is the duly appointed, qualified and acting guardian of the estate of said Cass W. Higgins, under appointment by the County Court of Oklahoma County, in the State of Oklahoma, and he as such guardian

and as next friend of the said Cass W. Higgins, prosecutes this action for and on behalf of the said Cass W. Higgins; and that the plaintiffs other than said Eva H. McMillan and Fairy Adkins, together with said William H. Higgins, inherited in equal parts all the real estate which the said Robert W. Higgins, Sr., owned at the time of his death, and the plaintiffs Eva H. McMillan and Fairy Adkins, as the sole heirs of said William H. Higgins, deceased, upon whose estate no administration has ever been had, have inherited in equal parts all the real estate and all share or interest in real estate which the said William H. Higgins owned at the time of his death, including that which he inherited from said Robert W. Higgins, Sr.

2. That the defendant is now, and was at all times herein mentioned, a municipal corporation and city of the first class, created, organized and existing as such under the laws of the State of Oklahoma, and possessing all the political, governmental, legislative and corporate powers [fol. 249] granted and delegated to a city of the first class under the laws of said state.

3. That the plaintiffs are the owners in fee simple of the full title, both legal and equitable, and are entitled to the immediate possession of the following described real estate situated in Oklahoma County, in the State of Oklahoma, and within the present corporate limits of the said City of Oklahoma City, to wit:

A strip of land one hundred (100) feet wide, the northeast corner of which commences at a point on the west line and one hundred (100) feet south of the northwest corner of Lot Twenty (20), in Block Sixty-four (64), in the original plat of the City of Oklahoma City, in the County and State of Oklahoma, as the same is on file and of record in the land title records of said county, and the southeast corner of which commences at a point on the west line and one-hundred (100) feet north of the southwest corner of Lot Nineteen (19) in said block Sixty-four (64), and which extends thence for a distance in a westerly direction and thence in a northwesterly direction across the southwest quarter (SW¼) of Section thirty-three (33) in Township Twelve (12) North, range Three (3) West of the Indian Meridian in said County and State, to the west line of Shartel Street extended north, as said street is laid out

in Main Street Addition to said City of Oklahoma City ac-
[fol. 250] cording to the recorded plat of said addition, the same being the right of way as originally surveyed, laid out and taken by the Choctaw Coal and Railway Company about the year 1892, and thereafter taken, occupied and used by the Choctaw, Oklahoma and Gulf Railroad Company, as successor to said Choctaw Coal and Railway Company, and afterward occupied and used by the Chicago, Rock Island & Pacific Railway Company as lessee of said Choctaw, Oklahoma and Gulf Railroad Company, as and for a railroad right of way and for railroad purposes, the said strip of land being more particularly designated upon a blueprint plat or map thereof hereto attached, marked Exhibit A, and made a part hereof;

that the plaintiffs deraign their title to the said real estate as follows:

By patent from the United States of America to Robert W. Higgins, dated September 19, 1896, a full, true and correct copy of which is hereto attached, marked Exhibit A, and made a part hereof.

By inheritance by the plaintiffs as all of the heirs, immediate and remote, of the said Robert W. Higgins, Sr., deceased, as herein above set forth.

4. That on the 24th day of March, 1896, the said Robert W. Higgins, Sr., by the name and style of R. W. Higgins and Susan A. Higgins, his wife, executed an instrument, termed a right of way deed and release of damages, to the said Choctaw, Oklahoma and Gulf Railroad Company, conveying [fol. 251] a strip of land one hundred (100) feet wide across said quarter section, which included the strip hereinabove described, for a right of way for its railroad, telegraph and telephone lines, and for railroad or station purposes, to be held by the said Choctaw, Oklahoma and Gulf Railroad Company with all the rights and privileges which said company was authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18, 1888, and subsequent Acts of Congress amending and extending said Act, together with all the rights and privileges granted unto the Choctaw, Oklahoma and Gulf Railroad Company by Act of Congress approved August 24, 1894, and Act of Congress approved April

24, 1896, a full, true and correct copy of which right of way deed and release of damages is hereto attached, marked Exhibit E, and made a part hereof; and that at the time of the execution of the said deed, the said Robert W. Higgins, Sr., was the owner of the fee title absolute to all of the real estate therein described.

5. That the said strip of land first above described was occupied and used continuously for right of way and railroad purposes only, and for no other purpose, by said Choctaw, Oklahoma and Gulf Railroad Company, and by its lessee, the said Chicago, Rock Island & Pacific Railway Company from the execution of said deed, Exhibit B, to about the 4th day of December, 1930; that on or about the 17th day of Novem- [fol. 252] ber, 1927, the said Choctaw, Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island & Pacific Railway Company entered into a contract whereby they agreed for a valuable consideration to convey to the defendant by a quit claim deed, all their right, title and interest in and to the real estate above described and to discontinue the use and occupation of, vacate and abandon the same for right of way and railroad business and purposes; that, thereafter, said railroad companies made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity granting them permission to abandon a portion of their line of railroad through the said City of Oklahoma City, described in their said application and including all the real estate above described and such proceedings were had on said application that thereafter, and on the 9th day of April, 1928, the Certificate of Public Convenience and Necessity as applied for was by said Interstate Commerce Commission granted, a full, true and correct copy of which is hereto attached, marked Exhibit D, and made a part hereof; that on or about the 4th day of December, 1928, the said Choctaw, Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island & Pacific Railway Company, as its lessee, for a valuable consideration, executed an instrument of conveyance termed a quit claim deed, by which they conveyed to the said defendant all of their right, title and interest in and to the tract of land first above described, together with other lands; that there- [fol. 253] after, and on the said 4th day of December, 1930, the said railroad companies abandoned the use of said land for right of way and railroad purposes and ceased using the

same for any railroad purpose or for any purpose whatever, and took up and removed all railroad tracks therefrom and delivered possession thereof to the defendant, and thereupon the said defendant entered into possession of said real estate and ever since has retained, and still does retain, the possession thereof to the exclusion of the plaintiff therefrom; and that the said defendant in purchasing said real estate first above described and obtaining said quit claim deed from said railroad companies therefor, and in entering into possession thereof, did not intend, and does not now intend, to use the same for a railroad right of way or for any railroad or station purpose, and has not used, and is not using, and cannot lawfully use, the same for any such purpose, but intends to enclose, appropriate, convert and apply the said real estate so as to make it a public park of said city, and for public use as such park, and now holds possession of said real estate for said purpose.

6. That by the terms and provisions of said deed, Exhibit B, and the said Acts of Congress, when the said railroad companies abandoned and discontinued the use of said real estate first described above for right of way and railroad purposes and undertook to convey the same to the defendant, and the defendant took possession thereof for the purpose of converting the same into a public park as above set forth, [fol. 254] then the plaintiffs as the successors in title, by inheritance to the said Robert W. Higgins, Sr., became the owners of the fee title absolute to the said real estate free and discharged from all and whatever right and title the said railroad companies, or any of them, may at any time have had to the same or to the use thereof for right of way and railroad purposes, or for any purpose, and also became entitled to the immediate possession thereof, which the defendant now wrongfully withholds from them; that the said quit claim deed purporting to convey whatever title the said railroad companies had in the said real estate to the defendant is conclusive evidence of the abandonment of the real estate therein described for railroad purposes, but is ineffective in law to convey any right, title or interest therein, for that the said railroad companies had no right, title or interest therein which they could convey to the defendant, and the defendant did not, and could not, acquire any title, right, claim or interest in and to said real estate under and by virtue of said quit claim deed; and that the said deed from said

railroad companies to the defendant constitutes a cloud on the title of the plaintiffs in and to said real estate which they are entitled to have cancelled and removed and they are also entitled to have the title to said real estate quieted in them against all claims of the defendant.

Wherefore, the plaintiffs pray that they have and recover of and from the defendant a judgment for the possession of [fol. 255] the real estate first described above, and the ejectment of the defendant therefrom, and a further judgment quieting title to said real estate in them against the defendant and cancelling and removing the said quit claim deed from said railroad companies to the defendant as a cloud on their title thereto, and a further judgment adjudging them to be the owners of said real estate in fee simple absolute, free and clear of any and all claims of the defendant whatsoever, and perpetually enjoining and restraining the defendant from ever asserting any claim of right or title thereto or interest therein, and that they have all such further or other and different relief in the premises as shall be lawful, equitable and just.

Suits and Disney, Fred Ptak, and Chas. H. Garnett,
Attys. for Plaintiff.

[fol. 256] EXHIBIT A TO PETITION

United States to Robert W. Higgins

The United States of America, to all to whom these presents shall come, greeting:

Homestead Certificate No. 2480

Application 9660

Whereas, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Oklahoma, Oklahoma Territory, whereby it appears that pursuant to an Act of Congress approved the 20th day of May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Robert W. Higgins has been established and duly consummated in conformity to law, for the Southwest Quarter of Section thirty-three, in Township twelve North of Range three West, of Indian Meridian,

in Oklahoma Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General:

Now Know Ye, That there is therefore granted by the United States unto the said Robert W. Higgins the tract of land above described:

To Have and To Hold the said tract of land, with the appurtenances thereof, unto the said Robert W. Higgins and to his heirs and assigns, forever.

[fol. 257] In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the Nineteenth day of September, in the year of our Lord one thousand eight hundred and ninety six, and of the Independence of the United States the one hundred and twenty first.

By the President:

Grover Cleveland, by M. McKean, Secretary.

Recorded, Vol. 5, page 345. E. T. Best, Assistant Commissioner and Recorder of the General Land Office ad interim.

The Territory of Oklahoma,
Oklahoma County, ss:

Entered in Numerical Index and filed for record in the Register of Deed's office of said County, this 2nd day of October, 1896, at 11 o'clock A. M., and recorded in Book 12 of Patents, on page 471.

G. A. Beidler, Register of Deeds.

[fol. 258] Exhibit B to Petition

Right of Way Deed

R. W. Higgins & Wife to Choctaw, Oklahoma and Gulf Railroad Company

Right of Way and Release of Damages

Know all Men by these Presents: That R. W. Higgins and wife of the County of Oklahoma in Oklahoma Territory, of the first part, for and in consideration of the sum of Four

Hundred Dollars paid for the use of for a wye, off the right of way of said Company, from about December, 1892, to about the year 1897, on and over the lands hereinafter described, to them paid by the Choctaw, Oklahoma and Gulf Railroad Company, of the second part, the receipt of which is hereby acknowledged, have granted, bargained, quit claimed and relinquished and by these presents do grant, bargain, quit-claim and relinquish and convey to the said Choctaw, Oklahoma and Gulf Railroad Company, party of the second part, the following described lands for a right of way for its railroad, Telegraph and Telephone Lines, and for Railroad or Station purposes, viz:

A strip of land 100 feet wide over, through and across the lands owned or claimed by the undersigned, towit: The South West Quarter of Section thirty three (33) Township twelve (12) North, Range three (3) West of the Indian Meridian in said County and Territory, said strip of land to extend 50 feet on each side of the center of the railroad [fol. 259] or track of said railroad as now located and constructed.

To have and to hold the same by the said Choctaw, Oklahoma and Gulf Railroad Company, together with all and singular the rights, privileges and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18th, 1888, and subsequent Acts of Congress amending and extending said Act together with all the rights and privileges granted unto said Choctaw, Oklahoma and Gulf Railroad Company by an Act of Congress approved August 24th, 1894, and the Act of Congress approved April 24th, 1896, and unto its successors, and assigns forever.

And in further consideration of the premises we do hereby acknowledge the receipt in full of all compensation and satisfaction for property taken and damage done by reason of the construction of said railroad including the land taken or damaged by reason of the cuts or fills made in the construction of said railroad and says "Wye."

Witness our hands this 24th day of March, A. D. 1898.

(Signed) R. W. Higgins, Susan A. Higgins.

Attest: B. D. Shear.

[fol. 260] TERRITORY OF OKLAHOMA, —
County of Oklahoma:

Before me George J. Shields, a notary public in and for said county and territory on this 24th day of March, 1898, personally appeared R. W. Higgins and Susan A. Higgins, his wife, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

(Signed) George J. Shields, Notary Public. (Seal.)

My commission expires Jan. 19th, 1901.

Recorded March 26th, 1898, in book 13 at page 181.

(Exhibit C to the foregoing petition is the same certificate as Exhibit D to the petition in the Noble case and appears in full at page — supra, hence is omitted here.)

[fol. 261] [File endorsement omitted.]

Upon the filing of the foregoing petition summons was duly issued out of said Court and was served on the defendant and returned into said court in manner and form as provided by law (C-M. 18-22).

[fol. 262] IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[Title omitted]

ANSWER AND CROSS-PETITION—Filed Feb. 13, 1931

Comes now the defendant, the City of Oklahoma City, and for answer says:

I

That it denies each and every material allegation contained in plaintiffs' petition not hereinafter specifically admitted.

II

And for further answer defendant says:

1. That defendant has no knowledge as to whether or [fol. 263] not the facts set forth in Section I, of plaintiffs' petition are true and correct as stated, and defendant, therefore, specifically denies each and all of said allegations.

2. That it admits that it is a duly organized municipal corporation and a city of the first class, under the laws of the state of Oklahoma, and possesses all the political, governmental, legislative and corporate powers delegated to a city of the first class as alleged in plaintiffs' petition.

3. (a) That it denies that the plaintiffs are the owner in fee simple of the full title both legal and equitable in and to the land described in plaintiffs' petition and further specifically denies that the defendant wrongfully detains the possession of said land from plaintiff and that plaintiff is entitled to immediate possession thereof.

(b) Defendant has no knowledge as to whether or not the United States of America executed a patent dated September 18, 1896, broad enough in its terms to convey to the said Robert Higgins, Sr., the land described in plaintiff's petition, and, therefore, defendant specifically denies that such a patent was executed and delivered. But defendant avers that if such a patent was executed and delivered, as described in plaintiffs' petition, a copy of which is set forth as Exhibit "A" thereto, which is not admitted but is hereby expressly denied, the said Robert Q. Higgins, Sr., took no title to said land described in plaintiffs peti- [fol. 264] tion or any part thereof, and in this connection alleges that long prior to the date of execution and delivery of said patent, the land involved in this suit and alleged to have been included in said patent, had been granted by Acts of Congress of the United States to the Choctaw Coal and Railway Company, a corporation, as a right of way for a railroad line to be built by said railway company. That the terms and conditions of said grant, as contained in said Acts of Congress, had been fully accepted by the said Choctaw Coal and Railway Company prior to the date of execution and delivery of said patent, and were being fully complied with by said railway company with the ap-

proval of the Secretary of the Interior and the Congress of the United States, and that said land was not public lands of the United States subject to be conveyed to the grantee in said patent or to any other person but was long prior to time of the alleged conveyance the property of the said Choctaw Coal and Railway Company. That the General Land Office had no power or authority whatsoever to convey the land described in plaintiffs' petition, or any part thereof to alleged grantee therein named, and that said patent was wholly void and of no effect and conveyed no right, title or interest in and to the said land, to the said Robert W. Higgins, Sr.

That the Acts of Congress hereinbefore referred to are one taking effect February 18, 1888, Chap. 13, 25 U. S. Statutes at Large, p. 35, and one taking effect February 13, 1889, Chap. 152, 25 U. S. Statutes at Large, p. 668.

[fol. 265] (c) Defendant has no knowledge as to whether or not the said Robert W. Higgins, Sr., is deceased and that said plaintiffs are his heirs immediate or remote, and defendant, therefore, specifically denies that the said Robert W. Higgins, Sr., is deceased and that the said plaintiffs are his heirs immediate and remote, as alleged in plaintiffs' petitions.

4. Defendant has no knowledge as to whether or not the said Robert W. Higgins, Sr., by the name and style of Robert W. Higgins and Susan A. Higgins, his wife, made, executed and delivered to the Choctaw Coal and Railway Company the alleged right of way deed and release of damages described in paragraph four of plaintiff's petition, a copy of which is set forth as Exhibit "B" thereto, and defendant therefore specifically denies that such a deed was executed and delivered, and defendant further specifically denies that the said Robert W. Higgins, Sr., at the time of the execution and delivery of said alleged deed was the owner of the fee simple title to the land described and set forth in said alleged right of way deed and release of damages. But defendant avers that if such a deed was executed and delivered, which is not admitted but is hereby expressly denied, neither the plaintiff nor his wife, Susan A. Higgins, by reason of the facts aforesaid, had any right, title, interest or estate, to, or in said land at the time of the execution and delivery of said alleged

quit claim deed and release of damages and that plaintiff now has no right, title or interest in or to said land or [fol. 266] any valid claim thereto.

5. (a) Defendant admits that the land described in plaintiffs' petition and claim by them was occupied and used continuously for right of way and railroad purposes only and for no other purpose, until the 4th day of December 1930, but defendant specifically denies that the date of possession and ownership of said land for railroad purposes began with the date of the execution and delivery of the alleged right of way deed and release of damages and defendant alleges that long prior thereto, to wit: on or about the early Spring of 1889 and soon after the said Act of Congress passed and approved February 13th, 1889, went into effect, the Choctaw Coal and Railway Company took possession of said land under said Acts of Congress for right of way and railroad purposes, and that said land was continuously the property of and owned and held by the said Choctaw Coal and Railway Company and its successors at interest, to wit, the said Choctaw, Oklahoma and Gulf Railroad Company and the said Chicago, Rock Island & Pacific Railway Company, from the 13th day of February 1889 to the said 4th day of December, 1930; and defendant further alleges that at the time it is alleged that the said quit claim deed and release of damages was executed and delivered, the said Choctaw, Oklahoma and Gulf Railroad Company was the owner of the fee title to said land and that neither the said Robert W. Higgins, Sr., nor his said wife had any right, title or interest therein, whatsoever.

(b) Defendant admits that on or about the 17th

[fol. 267] day of November, 1927, the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company entered into a contract with defendant whereby they agreed for a valuable consideration to convey to the defendant by quit claim deed all their right, title and interest in and to the real estate described in Plaintiff's petition and to discontinue the use and occupation of said land and vacate and abandon the same for railway and right of way purposes as alleged in plaintiff's petition.

(c) The defendant further admits that the said railroad companies made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line of railroad through said City of Oklahoma City; and defendant further admits that, acting upon said application, the Interstate Commerce Commission of the United States, did, on the 9th day of April, 1928, issue a certificate of Public Convenience and Necessity, granting permission of said railroad companies to vacate and abandon said right of way including the land described in plaintiffs' petition and that Exhibit "D" attached to said petition is a true and correct copy of said certificate.

(d) Defendant further admits that on the 4th day of December, 1928, the said Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island and Pacific [fol. 268] Railway Company executed and delivered to the defendant an instrument of conveyance of the property involved in this suit, termed a quit claim deed, by which the said railroad companies conveyed all their right, title and interest in and to the land involved in this suit, as alleged in plaintiffs' petition; and defendant further admits that on the 4th day of December, 1930, the Railroad Companies abandoned the use of said land for right of way and railroad purposes and ceased to use and occupy the same and that said railroad companies took up and removed all railroad tracks therefrom and delivered possession of said land to the defendant as alleged in plaintiffs' petition.

(e) Defendant further admits that upon the abandonment of said land by said railroad companies, as aforesaid, the defendant entered into possession of said land and has

ever since retained and still does retain the possession thereof, to the exclusion of the plaintiffs therefrom and defendant further admits that it is not now holding, occupying and using said land, nor does it intend to occupy, use and hold said land or any part thereof, for railroad right of way or for any railroad purpose whatever, but defendant avers that it now holds, uses and occupies the same and intends to hold, use and occupy the same as a public park of said City and for public use as such park, as alleged in plaintiffs' petition.

6. Defendant admits that when the railroad companies discontinued the use and occupation of said land as and for [fol. 269] a right of way and for railroad purposes, their title thereto was defeated and terminated, upon a decree being entered in the United States District Court in and for the Western District of the State of Oklahoma, finding, holding and declaring that such railroad companies had so abandoned said property, and defendant specifically denies that upon such abandonment the full fee simple title to said real estate reverted to the plaintiffs and that they became entitled immediately to re-enter and take possession of said land under the terms and provisions of said alleged deed, a copy of which is attached to plaintiffs' petition as Exhibit "C", and the defendant alleges that by reason of the facts hereinbefore stated, the said plaintiffs do not now have nor have they ever had any right, title or interest in and to said property, nor have they ever had any lawful claim to or right of possession of said land or any part thereof. That the fee simple title to said land and the right of possession thereof belongs to defendant.

7. (a) Defendant specifically denies that by the terms and provisions of said alleged deed, which is attached to plaintiffs' petition as Exhibit "B" and the said Acts of Congress, the land described in plaintiffs' petition, upon being abandoned by the railroad companies and its use discontinued for railroad purposes, the title thereto reverted to and became vested in the plaintiffs, free, clear and discharged from all right, title and interest of the said railroad companies and this defendant.

(b) Defendant further specifically denies that upon the [fol. 270] abandonment of said property and the discontinuance of the use thereof for railroad purposes, the plain-

tiffs became entitled to the immediate possession thereof and that the defendant now wrongfully withholds possession from plaintiffs. Defendant further specifically denies that the said alleged quit claim deed from the said railroad companies to the defendant is ineffective in law to convey any right, title or interest therein.

(c) Defendant further specifically denies that it did not and could not acquire title to said property by and through said quit claim deed from said railroad companies. Defendant further specifically denies that said quit claim deed constitutes a cloud on title of plaintiffs and that they are entitled to have said deed cancelled and to have the title to said property quieted in them. And defendant alleges that by and through the terms and provisions of said acts of Congress and by express provisions of an Act of Congress which went into effect March 8, 1922, Chap. 94, 42 U. S. Stats. at Large 414, and the facts hereinbefore alleged, the said property described in plaintiff's petition became the property of defendant upon a decree of the said United States District Court being entered, finding, holding, and declaring that said property had been abandoned for railroad purposes and the defendant now owns said property and has the right of possession thereof.

III

For further answer the defendant says:

[fol. 271] 1. That Congress of the United States passed an Act which was approved on the 18th day of February, 1888, Chap. 13, 25 U. S. Statutes at Large, p. 35, granting the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the State of Minnesota, a right of way through the Indian Territory, upon which to locate, construct, operate and maintain a railroad from a point on Red River (the southern boundary line of Indian Territory) at a bluff known as Rockey Cliff, in the Indian Territory and running thence by the most feasible and practicable route through the said Indian Territory, to a point on the East boundary line immediately contiguous to the west boundary line of Polk or Sevier Counties in the State of Arkansas; also a branch line of rail-

way to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a westerly or northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company in Tobucksey County, Choctaw Nation; with a right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to construct along and upon the right of way and depot grounds provided for in said Act.

2. That said corporation was authorized by said Act of Congress to take and use for all purposes of railway a right of way 100 feet in width through said Indian Territory for said main line and branch of the Choctaw Coal & Railway [fol. 272] Company and to take and use a strip of land 200 feet in width with a length of 3,000 feet, in addition to said right of way, for stations for every ten miles of said road, with the right to use such additional grounds where there were heavy cuts or fills as may be necessary for the construction and maintenance of the road bed and extending 100 feet in width on each side of said right of way.

That a copy of said Act of Congress is hereto attached, marked Exhibit "A" and made a part hereof.

3. That subsequently Congress of the United States, passed an Act which was approved February 13, 1889, Chap. 152, 25 U. S. Statutes at Large p. 668, amending the Act of February 18, 1888 aforesaid and granting an extension of right of way to the said Choctaw Coal and Railway Company under the same terms and conditions as that granted under said Act approved February 18, 1888, as aforesaid, from the said leased coal veins of said Choctaw Coal & Railway Company in Tobucksey County, Choctaw Nation, in a Westerly or Northwesterly direction by the most feasible and practicable route to an intersection with the line of the Atchison, Topeka & Santa Fe Railway Company at the most convenient point between Halifax Station and Ear Creek, otherwise known as the North Canadian River, with the right to construct, use and maintain such tracks, turnouts, branches and sidings and extensions as said company might deem it in their interest to construct along and upon the right of way and depot grounds pro- [fol. 273] vided for in said Acts.

That a copy of said Act of Congress approved February 13, 1889, is hereto attached, marked Exhibit "B" and made a part hereof.

4. That immediately after the taking effect of the said Act of Congress approved February 13, 1889, as aforesaid, the said Choctaw Coal and Railway Company, in compliance with the terms and provisions of said Acts of Congress selected and located the general route and line of its railway as in said Acts provided, and thereafter fully complied with all the terms and conditions thereof.

5. Defendant further alleges that the selection of said right of way by the said Choctaw Coal and Railway Company and the location and construction of said line of railroad upon said right of way and over and across the land described in plaintiffs' petition and sought to be recovered herein was fully approved in all things by the Secretary of the Interior of the United States and by Congress expressly and impliedly in various and divers Acts as will more fully hereinafter appear.

6. That on the 21st day of February, 1891, an Act of Congress was approved by which the time was extended for the construction and completion of said Railway for a period of two years from the 18th day of February, 1892. That Congress thereafter passed an Act, which was approved January 22, 1894, extending the time for the completion of said railroad to February 18, 1896.

[fol. 274] Copies of said Acts are hereto attached, marked Exhibit "C" and "D" and made a part hereof.

7. That in the year 1894, the said Choctaw Coal & Railway Company became insolvent and all of its property and franchises were on September 8, 1894, sold to Geo. H. Earl, Jr., Sidney F. Tyler, Frances I. Gowan, Geo. B. Kirkbride and Nicholas Thuron, by orders and judgments entered in the United States Court for Second Judicial Division of Indian Territory, sitting at McAlester, Indian Territory, and in the District Court of Oklahoma County, in an ancillary proceeding to the receivership proceeding in said court at McAlester, Indian Territory, and the District Court of Canadian County in an ancillary proceeding to that in the said United States Court at McAlester, Indian Territory. That said sale was not only made with the approval of the

said United States Court for said second Judicial Division of the Indian Territory and the other courts aforesaid, but with the approval of the Congress of the United States, said approval being given by Act approved August 24, 1894, wherein the above named purchasers of the property and franchises of the Choctaw Coal and Railway Company were granted specific authority to organize a corporation to take over said property and franchise of said Choctaw Coal and Railway Company; said Act of Congress being published as Chapter 330, 28 Statutes, at Large, p. 502, is hereto attached marked Exhibit "E", and made a part of this answer.

8. That after the sale of all the property and franchises of [fol. 275] said Choctaw Coal & Railway Company, as aforesaid, the said purchasers duly organized under the laws of the United States, the Choctaw, Oklahoma & Gulf Railroad Company, which succeeded to the absolute ownership of all the rights, property and franchises, including rights of way and station grounds belonging to the said Choctaw Coal and Railway Company, and that the Congress of the United States passed an Act which was approved April 24, 1896, recognizing the said Choctaw, Oklahoma & Gulf Railroad Company as the purchasers of and successors to all the said property franchises and rights of the said Choctaw Coal and Railway Company, and especially finding, ascertaining and declaring that the said Choctaw, Oklahoma & Gulf Railroad Company and its predecessor in interest, to wit, the Choctaw Coal & Railway Company had fully complied with all Congressional Acts and requirements as to the selection of right of way and station grounds, the location and construction of said railroad over the lands of the various Indian tribes and the lands belonging to the United States, including that described in plaintiffs' petition.

That said Act of Congress comprises Chapter 122, 29 U. S. Statutes at Large, p. 98. A copy of said Statute is hereto attached and marked Exhibit "F" and made a part of this Answer.

9. That at the time of the passage and approval of the said Acts of Congress approved February 18, 1888, and February 13, 1889, the land which is now embraced in Oklahoma City, including the land described in plaintiffs' peti- [fol. 276] tion, belonging to the Creek Nation of Indians

and the United States. That said Creek Indians obtained said land by Treaty with the United States, bearing date February 14, 1833. That in the year 1866, said Creek Nation of Indians, by Treaty dated June 14, 1866, conveyed said lands to the United States for the purpose of locating other civilized tribes of Indians thereon.

10. That by Treaty dated January 19, 1889, the Creek Tribe of Indians completely relinquished all claims to this western land, including all the land in what is now Oklahoma City, North of the North Canadian River.

11. That by reason of these treaties and relinquishments aforesaid, the title of the United States to this Creek Indian land became absolute on the 19th day of January, 1889, save and except the title to the right of way and station grounds previously expressly granted to the Choctaw Coal & Railway Company as aforesaid, and certain other tracts of land and reservations, not involved in this suit.

12. That the land sought to be recovered by plaintiffs in this suit was never open to settlement as a part of the public lands of the United States. That the Congress in said Act, approved March 2, 1889, which provided for the opening of the Country, including that in and around Oklahoma City specifically reserved all rights of way previously granted by it to railroad companies. That thereafter, to wit: on the 23rd day of March, 1889, Benjamin Harrison, President of the United States, in his Proclamation opening [fol. 277] the country in and around Oklahoma City for settlement at 12 o'clock noon, April 22, 1889, expressly set forth in said proclamation that the Country was opened under terms of and subject to all the conditions, limitations and restrictions contained in said Act of Congress approved March 2, 1889, and the laws of the United States applicable thereto. That Congress of the United States and the President, in the manner aforesaid, expressly withheld said land from claim and settlement of all persons.

13. Defendant further alleges that the Orzaniz Act which took effect May 2, 1890, expressly recognized the rights of way and land for station grounds previously granted to railroad corporations as the property of such railroad corporations and not subject to settlement or the claim of any person who might attempt to settle upon or lay

claim to said rights of way and station grounds or any part thereof.

14. Defendant further alleges that at the time the said Robert W. Higgins, Sr., originally attempted to settle upon and acquire rights in said land he had actual and constructive notice of said Acts of Congress which took effect February 18, 1888 and February 13, 1889, and that the land was located upon the route from the coal leases of said railway company in Tobucksey County, Choctaw Nation to a place on the A. T. & S. F. line of railroad between Halifax and North Canadian River, as designated by said Acts of Congress; that said Railway Company had accepted the terms of said Acts and that it was then complying with all the [fol. 278] terms and conditions thereof and owned the title to said land. And defendant further alleges that the said Robert W. Higgins, Sr., had actual and constructive notice of the Act of Congress opening the Country for settlement and the President's said Proclamation and knew that the land described in plaintiffs' petition was not open to settlement and the rightful claim of any person whatsoever save and except the said Railway Company, and that the attempt of the said Robert W. Higgins, Sr. to acquire title to said land or an interest therein was contrary to the laws of the United States and the terms of said Proclamation, and in violation of the rights of said railway company as defined and set forth in said Acts of Congress.

Defendant further alleges that if the terms of said patent to said Robert W. Higgins, Sr., are broad enough to include the land owned by said railway company and claimed by plaintiffs as aforesaid, the United States Land Office was wholly without authority by reason of the fact hereinbefore alleged, to include said land in said patent and did not intend to include the same therein; and that said Robert W. Higgins, Sr. took said patent with actual and constructive notice of said Acts of Congress and all the facts aforesaid including the ownership of said land by said railway company and knew at the time that he took said patent, which is not admitted but is hereby expressly denied, that it conveyed to him no right, title or interest in said land or any part thereof.

[fol. 279] The defendant, therefore, charges and alleges that by reason of the Acts of Congress, the President's Proclamation and the facts aforesaid, the said Robert W.

Higgins, Sr. never acquired any right, title or interest in said land or any part thereof, and that neither he, if he is now living, nor his heirs, executors, administrators, devisees or other successors in interest, if he is now deceased, have any right, title or interest in said land or any part thereof.

15. Defendant further alleges that after the time it is alleged by the plaintiffs that said right of way deed and release of damages was executed by the said Robert W. Higgins, Sr., and his wife, Susan A. Higgins, described and set forth in paragraph four of plaintiffs' petition, the said Robert W. Higgins, Sr., and his wife, Susan A. Higgins, sold, transferred and conveyed to other persons by various and divers deeds the entire said Southwest Quarter of Section 33, Township 12 North, Range 3 West, alleged in plaintiffs' petition to have been patented to said Robert W. Higgins, Sr. That said last described tract of land was the entire tract or subdivision of land through which that portion of said right of way now claimed by plaintiffs runs. That said deeds purport to convey the said entire tract of land and did convey same insofar as said Robert W. Higgins, Sr., was interested, and said deeds contained no exception and made no reservation of any right, title or interest whatever in said land or in said right of way in favor of the said Robert W. Higgins, Sr. That [fol. 280] by virtue of said deeds the said Robert W. Higgins, Sr. parted with all his right, title and interest in said land, including said right of way, if any he ever had therein, which is not admitted, but is hereby expressly denied, and then and there ceased to be the owner of any real property or interest therein abutting upon that portion of said right of way now claimed by plaintiffs herein; and that he never thereafter acquired any interest or title in or to such abutting property or said right of way, and had no interest or title in or to such abutting property or in said right of way at the time of his alleged death.

That by reason of the facts aforesaid, the plaintiffs upon the alleged death of said Robert W. Higgins, Sr., succeeded to and took no right, title or interest in the property described in plaintiffs' petition and now have no right, title or interest therein, or right of possession of said property or any part thereof.

16. Defendant further avers that Congress passed an Act which was approved March 3, 1905, whereby it authorized the Choctaw, Oklahoma & Gulf Railroad Company to lease or sell its line of railroad running over the land involved in this suit to the Chicago, Rock Island & Pacific Railway Company. That said Act of Congress is published in 33 United States Statutes at Large, p. 991, to which reference is hereby made and same is hereby adopted as a part of this Answer. That pursuant to said Act of Congress the said Choctaw, Oklahoma & Gulf Railroad [fol. 281] Company leased all the property and franchises of the said Choctaw, Oklahoma & Gulf Railroad Company, comprising the right of way and Station grounds including the property described in Plaintiffs' petition, to the said Chicago, Rock Island & Pacific Railway Company, for nine hundred and ninety-nine years.

17. Defendant further avers that the said Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company made application to the Interstate Commerce Commission of the United States for a Certificate of Public Convenience and Necessity, granting them permission to abandon a portion of their line or railroad through Oklahoma City, Oklahoma, including that part of the line which runs over the property described in plaintiffs' petition and that on the 9th day of April, 1928, the said Interstate Commerce Commission granted the Certificate of Public Convenience and Necessity as applied for, which is in letters, figures and terms as plaintiffs' Exhibit "D", attached to their petition.

18. Defendant further alleges that on the 4th day of December, 1928, the said Railroad Companies, for a valuable consideration, executed and delivered to defendant an instrument of conveyance termed a Quit Claim Deed, whereby said Railroad Companies conveyed all their right, title and interest in and to all said abandoned right of way and station grounds, including the real estate described in plaintiffs' petition as alleged in their petition.

19. That thereafter, on the 4th day of December, 1930, [fol. 282] the said railroad companies wholly abandoned their right of way and station grounds over and upon the land described in plaintiffs' petition and delivered possession thereof to the defendant and thereafter, on the said

4th day of December, 1930, the United States District Court, in and for the Western District of Oklahoma, in case—The City of Oklahoma City, Oklahoma, a Municipal Corporation, Complainant, vs. The Chicago, Rock Island & Pacific Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company, a corporation, defendants, the said case bearing Docket No. 1174—in Equity, entered a decree holding and declaring that the said railroad companies on the 4th day of December, 1930, wholly abandoned the said right of way and station grounds including the property described in plaintiffs' petition and that under and by virtue of the Act of Congress approved March 8, 1922, 42 U. S. Statutes at Large, p. 414, U. S. C. A. Chap. 43, Section 912, all the right, title, claim and interest in and to said property became absolutely vested in fee simple in the defendant.

A copy of the said decree is hereto attached, marked Exhibit "G", and made a part hereof.

20. Defendant further charges and alleges that by reason of the Acts of Congress, facts and circumstances aforesaid that the plaintiffs have never at any time had any right, title or interest or valid claim in or to the land described in their petition or any part thereof. That the defendant, being a municipal corporation, through which [fol. 283] said abandoned right of way runs and is located, became the owner thereof upon abandonment and the judicial determination thereof, as aforesaid, and is now the owner of the fee title to said land and is entitled to remain and continue in the possession thereof.

Cross-petition

For cross-petition against the plaintiffs the defendant hereby adopts by reference, all the facts and allegations made and set forth in Counts II and III of its Answer herein and makes the same as much a part of this Cross Petition as if fully set out herein by rewriting, and alleges further:

That said alleged patent of plaintiffs and their claim to the land is wholly unfounded and without right, but notwithstanding this fact, said alleged patent and claim constitute a cloud upon defendant's title to said land and

renders the title thereto objectionable and if permitted to remain upon and against said land the defendant will suffer irreparable injury, damage and loss, by reason thereof.

Wherefore, premises considered, defendant prays that the plaintiffs take nothing by their action; that plaintiffs' alleged patent be cancelled and held for naught, in so far as it relates to the property described in plaintiffs' petition and that the fee simple title to said land be decreed in defendant and fully quieted in defendant as against plaintiffs and all persons whomsoever; and that all persons [fol. 284] claiming by, through or under plaintiffs or any of them be forever barred and enjoined from asserting claim to any title or interest to or in said land or any part thereof, and that defendant recover all costs and be granted such other further and different relief as to the Court may seem equitable and proper in the premises.

A. L. Hull, Municipal Counsellor; W. H. Brown, Special Assistant, Attorneys for Defendant.

The Acts of Congress pleaded by the defendant in the foregoing Answer and Cross-petition and copies of which are attached thereto as Exhibits A to F, inclusive are the same as Exhibits A to F, inclusive, to the Answer and Cross-petition in the Noble Case and Exhibits A, B, C, D and F appear herein at pages 47, 57, 59, 60, and 62 supra, and a statement of the contents of Exhibit E appears at page 37 supra, and the copy of the Court Decree attached as Exhibit G to the foregoing Answer and Cross-petition is the same as Exhibit G to the Answer and Cross-petition in the Noble Case and appears herein at page 65 supra.

[fol. 285] [File endorsement omitted.]

[fol. 286] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

REPLY AND ANSWER TO CROSS-PETITION—Filed March 30, 1931

Come now the plaintiffs above named and for their reply to the answer, and answer to the cross-petition of the defendant filed herein, allege and say:

1. That they deny every material allegation in said answer and cross-petition contained, except such as admit or do not contradict, or are not in conflict with the allegations of their petition, and except such as are hereinafter specifically admitted.

[fol. 287] 2. That they admit the enactment of the several and various Acts of Congress and the promulgation of the proclamation by the President of the United States as pleaded and set forth in the defendant's answer and cross-petition, but deny the conclusions and argument drawn therefrom and the construction and interpretation placed thereon by the defendant in its said answer and crosspetition, and deny that said Acts of Congress and the said proclamation have the meaning or contain the terms and provisions in precise language or in substance or effect as alleged by the defendant in its said answer and crosspetition.

3. That they deny that the Act of Congress approved March 8, 1922, 42 Statutes 414, Title 43, Section 912, U. S. Code, has any application to the subject matter of this action or to the title of the plaintiffs to the real estate involved herein, for that the title to said real estate became vested in Robert W. Higgins, Sr., through whom the plaintiffs derive their title, by title derived from the United States more than twenty-five years prior to the enactment of said Act of Congress, and they aver that if it should be deemed and held that said Act of Congress did apply to the subject matter of this action, and to the plaintiffs' title to the real estate involved herein, then said Act of Congress is unconstitutional and void, for that it is in contravention of the Fifth Amendment to the Constitution of the United States in that it would have the effect to deprive the plaintiffs of their property without [fol. 288] due process of law and to impair the obligation of a contract.

4. That they aver that under the provisions of the Act of Congress of March 3, 1891, 26 Statutes 1099, Title 43, Section 1126, U. S. Code, the United States may not bring suit to vacate or annul any patent to real estate thereafter issued by it unless such suit is brought within six years after the date of such patent, and that, therefore, the United States could not by suit, and the Congress could not by the enactment of a statute such as said Act of March 8, 1922, more than twenty-five years after the issuance of the patent to the real

estate here involved, Exhibit A to the plaintiffs' petition, cancel or annul such patent and re-vest the title to the real estate therein described, or any part thereof, in the United States.

5. That by reason of its said patent, Exhibit A to the plaintiffs' petition, the United States was and is estopped to assert that the real estate described therein was not public lands and was not a part of the public domain, and was and is estopped to assert that it had and retained any right, title, interest or estate in or to any part thereof, subject to the use of the same for a railroad right of way, which the Congress might dispose of upon the cessation of the use and occupancy thereof for such purpose, and the defendant is likewise estopped to assert any right, title, interest or estate in or to the particular real estate involved in this action as derived by it from the United States under the provisions of said Act of Congress, of March 8, 1922.

[fol. 289] 6. That they aver that the defendant derives all and whatever claim of right, title, interest or estate it may have to the real estate involved in this action by quit claim deed from the Choctaw, Oklahoma and Gulf Railroad Company and the Chicago, Rock Island and Pacific Railway Company, and that said grantors in said deed derived all of their title thereto as successors to, and by, through and from, the Choctaw Coal and Railroad Company, and that it and they were and are estopped, and the defendant as their successor in title is estopped, to deny the title of the said Robert W. Higgins, Sr., to said real estate on and prior to the 24th day of March, 1898, by reason of the fact that the said Choctaw Coal and Railway Company did on said 24th day of March, 1898, purchase, receive and accept from the said Robert W. Higgins, Sr., the said right of way deed, Exhibit C to the plaintiffs' petition, which contained the express limitation and condition on the grant of the real estate therein described that if and when the same was abandoned and ceased to be used for railroad purposes, it should revert to the grantor, his heirs or assigns, and thereby said railway company contracted and agreed with the said Robert W. Higgins, Sr., that said real estate would revert to him or his heirs when its use for railroad purposes was abandoned and ceased, and the plaintiffs as heirs to the title of the said Robert W. Higgins, Sr., to said real estate have all the rights,

under said right of way deed which said Robert W. Higgins, Sr., would have if living.

[fol. 290] 7. That they aver that the said Choctaw Coal and Railway Company did not take, nor claim, intend or pretend to take, title to its right of way across the real estate involved in this action under and by authority of the provisions of said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and did not at any time file in the office of the Secretary of the Interior a map showing the route of its located line of road over said real estate, and further that if it did in fact file such a location map showing its line passing over said real estate, which the plaintiffs do not admit, then the same was not filed until after the right of the said Robert W. Higgins, Sr., to acquire from the United States the title to the said real estate had attached thereto nor until after it had filed such location map showing its line passing by and around, and not over and across, the said real estate, which filing of such map exhausted its right to make location of its said line of road under the provisions of said Acts of Congress and it could not thereafter, and after the rights of the said Robert W. Higgins, Sr., had intervened and attached, relocate its said line under the provisions of said Acts of Congress over and across said real estate, and further that it abandoned, relinquished and waived all claim of right to locate and take its right of way across said real estate under the provisions of said Acts of Congress, for that on or about December 4th, 1891, it changed the route of its line from that shown on its said location map [fol. 291] to another entirely different one which included the real estate involved herein, and without filing another location map in the office of the Secretary of the Interior showing such change, it purchased the right of way on such changed location from one John W. Dawson and wife on said date and took a deed therefor which expressly provided that said railway company took title to said right of way for railroad purposes only and that its said title would cease and revert to the grantor or owner of said real estate whenever the use thereof for right of way and railroad purposes ceased and was abandoned, and that it accepted said deed and changed the located route of its line so as to cross the real estate therein described, which included the real estate involved in this action.

8. That they specifically deny that the said Choctaw Coal and Railway Company complied with the provisions of said Act of Congress of February 18, 1888, as amended by said Act of Congress of February 13, 1889, and aver that all and whatever right it ever had to take and use a right of way for its said road over and across the said real estate involved in this action became and was forfeited for noncompliance with the provisions of said Acts of Congress and had ceased to exist prior to the commencement of said condemnation proceedings above referred to and the purchase of the title conveyed by said deed, Exhibit C to plaintiffs' petition.

9. That they admit that upon the abandonment of said real estate by said Choctaw, Oklahoma and Gulf Railroad [fol. 292] Company and said Chicago, Rock Island and Pacific Railway Company for a right of way and on December 4, 1930, the District Court of the United States for the Western District of Oklahoma made and entered its judgment and decree in said cause No. 1174—Equity in said Court, adjudging and decreeing that the said railroad companies had abandoned and forfeited all their right, title and interest in and to the real estate therein described and including the real estate involved in this action, and that a copy of said judgment and decree is attached as Exhibit G to the defendant's answer and cross-petition herein.

10. That they aver that if the defendant, in appropriating and using the real estate involved in this action as and for a public park, as alleged in paragraph 4 of plaintiffs' petition and admitted in paragraph 4 (g) of its answer, without having purchased or attempted to purchase, and without having instituted condemnation proceedings against the plaintiffs' right and title thereto, or having compensated the plaintiffs in any way therefor, and without intending to do so, relies upon and justifies its action under the proviso found in Section 5505 of Compiled Oklahoma Statutes, 1921, which reads as follows, to wit:

"Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in [fol. 293] this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon

the owner of such land shall be determined in the manner provided in this article for condemnation proceedings;"

then that said statute, in so far as it provides or may be construed to provide that the defendant may occupy and remain in possession of said real estate before the compensation and damages to the plaintiff therefor have been ascertained and paid, is unconstitutional and void for that it contravenes Section 24 of Article 2 of the Constitution of the State of Oklahoma.

Wherefore, having fully replied to the answer and answered the cross petition of the defendant herein, the plaintiffs pray for judgment in their favor, as in their petition they have prayed.

Fred Ptak and Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 294] IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

No. 66,314

ROBERT W. HIGGINS et al., Plaintiffs,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants

CAPTION

Be it remembered: That on this 16th day of September, 1931, the same being a regular judicial day of the regular September Term, 1931, the above and foregoing cause coming regularly on for trial on its merits, pursuant to assignment duly made, had and published and all parties being present by their respective counsel as above stated, and all parties having announced ready for trial and having agreed that said cause be tried by the Court, without the intervention of a jury, thereupon, the opening statement for and on behalf of the plaintiffs was made to the Court by Mr. Gar-

nett and thereafter, the opening statement for and on behalf of the defendant was made to the Court by Mr. Hull; and thereafter, the following proceedings were had in regular order, to wit:

[fol. 295] STATEMENT OF THE EVIDENCE

This case was called for trial in the same court in which the case of George Noble et al vs. City of Oklahoma City, No. 66,726 was tried and on the day following the conclusion of the trial of that case. It was stipulated that all evidence, both oral and documentary, insofar as desired by either party, that was offered in the Noble case, should be deemed offered in this case, with the same objections, if any, and the same rulings of the court and the same exceptions (C-M. 105).

Plaintiffs introduced a certified transcript from the General Land Office of the proceedings in relation to the entry of the southwest quarter of Section 33, Township 12 North, Range 3 West (C-M. 105-149).

These proceedings show the filings on this tract and a long drawn out land office contest. There were eight claimants, and the local land office awarded it to John M. Dawson. The other claimants appealed to the Commissioner of the General Land Office at Washington, who affirmed the judgment of the register and receiver. Six of the other claimants appealed to the Secretary of the Interior. In a decision dated June 29, 1894, the secretary reviewed the history of the contest and the evidence and awarded the tract to Robert W. Higgins. This decision is reported as Higgins vs. Adams, Vol. 18, page 598, of Decisions of the Department of the Interior Relating to Public Lands. The fact is shown that [fol. 296] Higgins arrived and made settlement on the tract at 10 minutes after 2 o'clock in the afternoon of April 22, 1889 (C-M. 143-148), and made application to enter it as a homestead on May 2, 1889 (C-M. 108).

Plaintiffs introduced a patent, based on a homestead certificate, from the United States to Robert W. Higgins, conveying said quarter section, dated September 19, 1896, and recorded October 2, 1896, in Book 12 at page 471 of land title records of Oklahoma County, Oklahoma (C-M, 149-152). It appears in full at page 256, supra.

Plaintiffs introduced a certified copy of a right of way deed from Robert W. Higgins and wife to the Choctaw Coal

and Railway Company, dated March 24, 1898, and recorded March 26, 1898, in Book 13 at page 181 of the land title records of Oklahoma County. This conveyance is entitled right of way deed and release of damages and recites a consideration of $400.00 and is the same deed of which a copy is attached as Exhibit B to the plaintiffs' petition in the deraignment of their title, and appears in full at page 258, supra (C-M. 157-162).

Plaintiffs introduced the contract between the city of Oklahoma City and the St. Louis-San Francisco Railway Company, dated November 17, 1927 (C-M. 162-169). This is the same instrument put in evidence in the Noble case as Exhibit 19, by the terms of which the railroad agreed to [fol. 297] sell, and the city agreed to purchase, at a price stated, their rights of way through the city.

The plaintiffs introduced the same certificate of public convenience and necessity issued by the Interstate Commerce Commission, authorizing the abandonment by the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company of the portion of their line of road through Oklahoma City, described in the application that was introduced in the Noble case (C-M. 170-172). It was stipulated that the land so described included the land involved in this case. This certificate appears in full at page 23, supra.

Plaintiffs introduced a deed from the Choctaw, Oklahoma & Gulf Railroad Company and the Chicago, Rock Island & Pacific Railway Company to the City of Oklahoma City, dated December 4, 1928, recorded in Book 356 at page 377 of the land title records of Oklahoma County (C-M. 173-184.) It was stipulated that this deed was executed by the companies under the contract of November 17, 1927, and that it conveyed the land involved in this action and other lands.

Plaintiffs introduced the decree of the United States District Court for the Western District of Oklahoma, in equity case No. 1174, being the same decree introduced in the Noble case. Its purport was to adjudge the abandonment [fol. 298] by the railroad companies of their right of way over the land described, which included the land involved in this action, and to adjudge the city of Oklahoma City to be the owner of their title (C-M. 185, 75-83). It appears in full at page 65, supra.

Plaintiffs introduced the oral testimony of Susan A. Higgins. She lives in Oklahoma City, was 83 years old, and came to Oklahoma City May 22, 1889, as the wife of Dr. Robert W. Higgins. He came on April 22. They had a family of six children who came with her by train from Arkansas City, Kansas. On arrival she and the children went to what is now No. 729 West Main Street, where Dr. Higgins had built a three room house for them. The family, consisting of Dr. Higgins, herself and the children, lived there continuously until after 1898, when they obtained patent to the land, and in fact she had moved away from that location only four years prior to the time of trial. She recalled when the Choctaw road was built across the quarter section, which was probably in 1892. They had lived there at least three years when that road was built. There were several contests over the right to homestead entry of the land, and these delayed the issuance of the patent (C-M. 186-189).

Plaintiffs introduced the oral testimony of Estella Higgins Jones. She was the daughter of Dr. Robert W. Hig- [fol. 299] gins and Susan A. Higgins. Her father died June 8, 1916. He left nine children surviving him. They were John, Cass, Robert, Raleigh, Burford and William Higgins, and Mrs. Gertrude Koelsch, Mrs. Nellie Shannon and herself. William Higgins, a son of Dr. Higgins by a former marriage and a half brother to the witness, died about 1923 or 1924, leaving two children surviving him, Mrs. Fairy Adkins and Mrs. Eva McMillan. He was not married at the time of his death, and these two children were his only heirs. His estate was never probated. Dr. Higgins and Mrs. Higgins, the witness' father and mother, were divorced about 1907. At the time of her father's death his only heirs were the children she had named. Then later William died, leaving his two children as his only family and only heirs. The persons named, all of whom are plaintiffs in the case, were now the only heirs, direct or remote, of Dr. Higgins. Cass Higgins had been adjudged insane on August 30, 1913, and had been an inmate of an asylum at Patton, California, ever since. She remembered the construction of the Choctaw road across the Higgins family homestead. The family arrived on May 22, 1889, and the road was built some three or four years later (C-M. 190-193).

Thereupon it was stipulated and agreed that in the divorce proceedings between Susan A. Higgins and Robert [fol. 300] W. Higgins, there was a property settlement and a decree of court by which she was awarded certain described city lots and all the rest of their property was awarded to or left in Dr. Higgins, and that the lots awarded by that decree to Mrs. Higgins were not included in the real estate involved in this action.

It was also stipulated and agreed that between the date of December 4, 1930, when the defendant took possession of the land involved in this action, and January 6, 1931, when the action was commenced, no improvements were placed on the land involved by the city, and the surface had not been graded, but that since that date the city had enclosed part of the land with a one-wire fence and had caused part of it to be graded and planted in bermuda grass (C-M. 194).

The plaintiffs rested their case.

Defendant introduced all of the evidence, both documentary and oral, which it had introduced in the Noble case, and the same stipulations were entered into (C. M. 196-383).

In addition defendant introduced further oral testimony of L. D. Cornelius as follows (C. M. 286-297):

[fol. 301] Mr. L. D. Cornelius, being called as a witness on behalf of the defendant in this case, being first duly sworn upon his oath, testifies as follows:

Direct examination.

By Mr. Hull:

Q. Mr. Cornelius, it has been stipulated in this case that all of the testimony you gave yesterday might be considered as your testimony in this case, without having to go through it a second time. Now, on that testimony, I want to ask you why it was necessary, if it was necessary, in the quarter section of land which is involved in this case, which is the quarter section immediately west of Walker Street, pitching the original townsite to adopt the line of construction of the road south of where that line showed on the map, filed July 13, 1889, (handing witness a map or diagram identified as Exhibit 12)?

A. It was done as a compromise matter to get a place to build a railroad, that's the best explanation I would give for it.

Q. Well, let me ask you again; perhaps I haven't made myself clear. You testified yesterday that that curve was made but your testimony in this case was that the road across the southeast quarter was constructed, as it was constructed, due to the circumstances and conditions and controversy with the citizens as you testified to yesterday.

A. Yes, sir, that was the reason.

[fol. 302] Q. Yes, sir; now, after you had made that construction through the southeast quarter, why did the road continue south of your original alignment through the adjoining quarter?

A. I don't know exactly, but there was undoubtedly some reason for—there is where our angle occurred, right about there (indicating on diagram).

Q. Was it, Mr. Cornelius, this is probably the reason, was it necessary that that be turned in order to avoid making such an abrupt curve after you had constructed south through the townsite in order to get back to your original alignment?

A. No, I don't think it was.

Q. You don't think it was?

A. I think that we started at that point; that ground—it would be some distance north of the center of the southwest quarter of Section 33. We run a little parallel, extended this alley line out through there to where the eighty, or about where the eighty acre line would be, dividing that quarter into two eighty's, east and west; and there is where we made an angle, a small angle to the north, to go into our right of way up there. (Indicating.)

Q. Let me ask you this, after you had constructed your line due east and west to the southeast quarter, could you have gotten back on to your alignment up here without making such an abrupt curve?

A. No, it would have been—this location with that small [fol. 303] angle would have—well, I don't think from a construction standpoint, or any other standpoint, it would have been really any different but my recollection is that that small angle would place it on that eighty acre line, that would be the far quarter line—now, what those were I can't recall about.

Q. You don't recall about that?

A. No, whether it was at the request of the, of some people who were interested in getting this route, or whether

it was the intent of the quarter, I couldn't say, but there was a reason for putting that little angle and that slight curve on that quarter line.

Q. You don't think as a matter of engineering construction that when the line was changed through the townsite that change caused the change in the adjoining quarter section?

A. Yes, we had to make some change here (indicating). We dropped down here (indicating). We dropped to the southeast, extended tangent to the last track to the south and it could come back again on to our original location and we had to make that change in the quarter.

Q. It was because you had dropped this line in the southeast quarter south of your original alignment but when you reached the southwest quarter in order to avoid a direct turn-back, to your original alignment, you had to continue your line a little south through that quarter?

A. Yes, sir.

[fol. 304] Q. Yes, sir.

A. To make a lighter curve.

Q. Yes, sir.

A. And a better alignment.

Cross-examination.

By Mr. Garnett:

Q. Mr. Cornelius, you were not with the railroad company in the construction, at the time of the construction of the road across the southwest of 33, were you?

A. No, sir, that was done later.

Q. Yes; you testified yesterday but I have forgotten the date as to when your connection with this work here was severed. When was that?

A. In December 31, 1890.

Q. 1890?

A. Yes, sir.

Q. Well, now, had the change of location of the road through the city, through the southeast of 33, been made at the time or prior to your severance of connection with the railroad company?

A. That may cover some ground; the surveys had been made and the surveys going through on this change, that had been made and retraced.

Q. Retraced on what, the profile map or location map?

A. No.

[fol. 305] Q. On what?

A. On the ground.

Q. Oh, on the ground.

A. It was made on the ground but there wasn't anything done with it up to the time of January 1, 1891.

Q. You don't mean the line was retraced on the ground, do you?

A. Yes, sir.

Q. Well, when was it first traced?

A. The change was made the first week in April.

Q. Of what year?

A. 1890 and, the line was restaked because the citizens, I think it was the—I call it the Citizens Committee, the stakes had been obliterated and I set those stakes exactly forty-one years ago today on the 16th of September.

Q. Well, now, those stakes that you re-set, are the stakes along the course of the right of way of the railroad as was afterwards actually built, were they?

A. Well, the only way I can answer that is by going over the ground since I have been in Oklahoma City the last few days.

Q. Well, all right; that's all right.

A. And I think that they have followed that survey, I am quite sure; they may have varied in some slight particular but I think if the original notes of that survey that [fol. 306] I made on this change, could be found, the alignment notes, you would find that they were exactly on the line that was built on and part of it is not.

Q. Well, then, the change from the original location of the road, as made on the location map of July 13, 1889, down to where the road was afterwards built across the southwest of 33, was made to conform to the changed line through the city, was it?

A. Yes, sir.

Q. Now, do you know how far it was before you got back on to your original located line, how far west the line went?

A. We tied into a curve farther west.

Q. Do you know how far?

A. Probably a mile, between a mile and a mile and a half, something like that; that's probably it.

Q. Refreshing your recollection from this map, which we had a moment ago, on which the white line of the—which the white line appears, the line of actual construction, about where did that join the original survey?

A. Can I make some marks on here?

Q. Well, it's not necessary. In what section?

A. Well, in this section (indicating).

Q. Well, what is it?

A. Section 31.

Q. Yes, and at what point in 31?

[fol. 307] A. On the intersection of those two tangents would be almost on the quarter section line on the north half of 31.

Q. Yes, sir. The, it would be on the middle line north and south on Section 31 at a point between one-fourth and one-third of the distance south of the north line of the section?

A. Where we graded the whole location?

Q. The whole location.

A. No, sir.

Q. That isn't? All right, where is it?

A. There is the end of the curve (indicating).

Q. Now, you had an angle going east and west; now, where is the point on this map where those two lines come together?

A. It isn't shown, sir.

Q. Do you know and can you tell from the map?

A. I can give it to you approximately.

Q. All right, where is it?

A. Somewheres right about there (indicating).

Q. Now, where is "there"?

A. Well, it's some place on the east side, on the northwest quarter of section 31. To get back to the original survey, we had to put in a curve to the north.

Q. Yes, I understand that but at what point on the ground, describing it by section number and the approximate location, did you get back on the original survey?

[fol. 308] A. We got back to our original location right at the beginning of this curve (indicating).

Q. Now, where is the beginning of that curve on this map?

A. It's in the northwest quarter of Section 31.

Q. Can you tell how far south of the original survey the original location map, this line on which the road was con-

structed, is, where you cross the east line of the southwest quarter of section 33?

A. I know about where this intersection was in the original location.

Q. That's what I want to know, how far from here to here (indicating).

A. My recollection is, it is about 600 feet and I vary that from being on the ground later.

Q. Do you know, Mr. Cornelius, when the railroad was constructed across the southwest quarter of 33?

A. Only by hearsay; I have no definite dates.

Q. You were not here at that time?

A. No, I was not here; I was in Denison, Texas, but I couldn't give you anything that you couldn't get——(interrupted).

Q. I am just asking you; it was after December 31, 1890, when you quit the service of the road?

A. December 31, 1890, when I left the service and it was graded through there after that.

[fol. 309] Mr. Garnett: That's all.

Redirect examination.

By Mr. Hull:

Q. Mr. Cornelius, when you made that location through Oklahoma City, through the townsite, on the direct east and west line, at that same time that you said yesterday was between the 10th and the 16th or 17th or September, 1890, you also made the location through the southwest quarter?

A. Yes.

Mr. Hull: Yes, sir; that's all.

Mr. Garnett: That's all.

(Witness excused.)

The defendant rested its case.

In rebuttal plaintiffs introduced the same evidence, both oral and documentary, that was introduced in the Noble case on the day preceding, except the court files in the condemnation proceedings, case No. 212 in the District of Oklahoma County, Territory of Oklahoma (C-M. 401-455).

[fol. 310] It was stipulated that the defendant in taking possession of the property involved in this action on December 4, 1930, did not take it with the consent of the plaintiffs, except such consent as might be implied as a matter of law, but went in under a delivery of possession from the railroad company (C-M. 456).

It was stipulated that all of the property involved in this action was on January 1, 1922, and had been continuously since, within the corporate limits of Oklahoma City, but that it was outside of the limits of the original townsite of Oklahoma City, which covered only the southeast quarter of said Section 33 (C-M. 457).

Both parties rested and the evidence was closed.

[fol. 311] Thereupon the case was argued orally to the Court and written briefs were submitted and the Court took the matter of his decision and judgment therein under advisement (C-M. 465).

And thereafter on the 9th day of January, 1932, the case again came on for decision and judgment of the Court and thereupon the Court announced and rendered a decision and judgment for the defendant (C-M. 466).

[fol. 312] In the District Court of Oklahoma County

[Title omitted]

Motion for New Trial—Filed Jan. 11, 1932

Come now the plaintiffs in the above entitled action and move and ask the court to vacate and set aside the former decision of the court made and rendered in this action on the 9th day of January, 1932, and to grant these plaintiffs a new trial of this action for the following causes which affect materially their substantial rights:

[fol. 313] 1. For irregularity in the proceedings of the court and of the defendant and for abuse of discretion on the part of the court by which the plaintiffs were prevented from having a fair trial.

2. For misconduct of the defendant.

3. For accident and surprise which ordinary prudence on the part of the plaintiffs could not have guarded against.

4. For that the said decision of the court is not sustained by sufficient evidence.

5. For that the said decision of the court is contrary to law.

6. For newly discovered evidence material to these plaintiffs which they could not with reasonable diligence have discovered and produced at the trial.

7. For error of law occurring at the trial and excepted to by these plaintiffs at the time.

Libby & Sherwin, Suits & Disney, Fred Ptak, Chas. H. Garnett, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 314] And thereafter on the 21st day of January, 1932, the cause again comes on for hearing on the motion of the plaintiffs for a new trial, and the Court, having heard the argument of counsel thereon and considered the same, orders that said motion be overruled, to which the plaintiffs except and in open court give notice of appeal to the Supreme Court and ask and are given time in which to make and serve case-made for their appeal (C-M. 469).

And thereafter on the 23rd day of January, 1932, there was filed in the cause and recorded on the journal of the Court the decision and judgment of the Court and its order overruling plaintiffs' motion for new trial and allowing their appeal and a record of the proceedings for such appeal all in the words and figures as follows, to wit, (C-M. 470-477):

[fol. 315] In the District Court of Oklahoma County

[Title omitted]

Journal Entry of Judgment—Jan. 23, 1932

On this 15th day of September, 1931, being one of the regular court days of the September, 1931, term of this court, this cause comes on for trial in its regular order. The plaintiffs appear in person and by Suits and Disney,

[fol. 316] Libby and Sherwin, Fred Ptak and Chas. H. Garnett, their attorneys. The defendant appears by Albert L. McRill, its municipal Counselor, and A. L. Hull, its Assistant Municipal Counselor. Both plaintiffs and defendant announce ready for trial.

Thereupon, trial by jury is waived in open court and all parties consent and agree that the Court shall try the cause and make decision and render judgment therein without the intervention of a jury.

Thereupon, the trial is begun and all the evidence on the part of the plaintiffs and defendant, respectively, is introduced and the argument of counsel is heard, and at the conclusion thereof, the Court takes under advisement the matter of decision and judgment.

On the 9th day of January, 1932, being one of the regular court days of the January, 1932, term of this Court, this cause again comes on for decision and judgment by the Court. The parties appear as upon the trial.

Thereupon, the Court, having heard all the evidence and the argument of counsel, and being fully advised in the premises, announces and makes decision and judgment in the case.

The Court finds the issues for the defendant and finds that judgment should be that the plaintiffs take nothing by the action and that the defendant have judgment for its costs, and judgment on its cross-petition.

The Court holds, as a matter of law, that the Act of Congress of February 18, 1888 (25 Stats. 35) together with [fol. 317] the Acts amendatory thereof, was a present absolute grant of the land described in the petition herein for right of way and station grounds to the Choctaw Coal and Railway Company, vesting the fee title to said land in said Company immediately upon the enactment and approval of said Act, with a possibility of reverter in the United States, and that the patent purporting to convey to R. W. Higgins the whole of the Southwest Quarter of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West of the Indian Meridian, was ineffective to convey to said R. W. Higgins any title to the land within the boundaries of the right of way of said Company across said quarter section as and when located, and that, therefore, the said right of way having been located in conformity to said Act, so as to include all the land involved

in this action, neither the plaintiffs, nor any persons through whom they claim to have derived title under said patent, now have, or have ever had, any sort of right or title whatsoever to said land.

The Court holds further, as a matter of law, that the land included within the boundary lines of said right of way, as the same should thereafter be and was thereafter located, was, by the Act of Congress aforesaid, appropriated to a lawful use and thereby severed from the public domain of the United States, and was never thereafter subject to preemption, homestead or townsite entry, and that the Land Department of the United States had no authority, after the enactment of said Act, to grant any title to said land to any person.

[fol. 318] The Court further holds, as a matter of law, that upon abandonment for railway purposes of said land within the boundaries of said right-of-way and station grounds, title to said land revested in the United States, and upon entry of the decree of the United States District Court for the Western District of Oklahoma finding such abandonment, that the title to said land immediately vested in the City of Oklahoma City, a municipal corporation, by virtue of the Act of Congress of March 8, 1922 (42 Stats. 414).

It is, therefore, considered, ordered and adjudged by the Court that the plaintiffs take nothing by this action, and that their petition here be, and it is hereby dismissed and that all costs of the action be, and they are hereby, taxed and adjudged against the plaintiffs.

It is further considered, ordered and adjudged by the Court that the City of Oklahoma City, a municipal corporation, is vested with the absolute fee simple title to the land involved in this action described as follows:

A strip of land One Hundred (100) feet wide, the northeast corner of which commences at a point on the west line and One Hundred (100) feet south of the northwest corner of Lot Twenty (20), in Block Sixty-four (64) in the original plat of the City of Oklahoma City, in the County and State of Oklahoma, as the same is on file and of record in the land title records of said County, and the Southeast [fol. 319] corner of which commences at a point on the west line and One Hundred (100) feet north of the southwest corner of Lot Nineteen (19) in said Block Sixty-four (64),

and which extends thence for a distance in a westerly direction and thence in a northwesterly direction across the Southwest Quarter (S. W. ¼) of Section Thirty-three (33), in Township Twelve (12) North, Range Three (3) West of the Indian Meridian in said County and State, to the west line of Shartel Street extended north, as said street is laid out in Main Street Addition to said City of Oklahoma City according to the recorded plat of said Addition, the same being the right of way as originally surveyed, laid out and taken by the Choctaw Coal and Railway Company about the year 1892, and thereafter taken, occupied and used by the Choctaw, Oklahoma and Gulf Railroad Company, as successor to said Choctaw Coal and Railway Company, and afterward occupied and used by the Chicago, Rock Island & Pacific Railway Company as lessee of said Choctaw, Oklahoma & Gulf Railroad Company, as and for a railroad right of way and for railroad purposes; the said strip of land being more particularly designated upon a blueprint plat or map thereof, marked [fol. 320] Exhibit "A", attached to the original petition filed in this cause;

subject only to the reservations contained in the Act of Congress of March 8, 1922, aforesaid (42 Stats. 414), and that such title be, and the same is hereby fully quieted in said City as against the plaintiffs herein, and all persons claiming by, through or under said plaintiffs; and that said plaintiffs and all persons claiming by, through or under said plaintiffs, or either of them, are forever barred and enjoined from asserting claim to any title or interest to or in said land, or any part thereof.

To all of which findings, decision and judgment of the Court the plaintiffs at the time excepted, and their exception is allowed.

Thereafter, and on the 11th day of January, 1932, the plaintiffs filed herein their motion for new trial in writing, and now on this 21st day of January, 1932, the said motion of the plaintiffs for new trial comes on for hearing in its regular order. The parties appear as upon the trial of the action.

Thereupon, the Court considers said motion, and having heard the argument of counsel thereon, and being fully advised in the premises, finds that the same should be overruled and denied.

It is therefore, considered, ordered and adjudged by the Court that the motion of the plaintiffs in this action for new trial be, and the same is hereby overruled and denied.

To all of which findings, decision and order of the Court [fol. 321] overruling their said motion for new trial the plaintiffs at the time except and their exception is allowed.

Thereupon, the plaintiffs give notice in open court of appeal to the Supreme Court of the State of Oklahoma from the said findings, decision, judgment and orders of the Court in this action, and requests the Court to order and direct the clerk to enter their said notice of appeal upon the journal and trial docket of the Court.

Thereupon, it is considered and ordered by the Court that the clerk of this Court be, and he is hereby ordered and directed to enter of record and to spread upon the trial docket and journal of this Court the said notice of appeal of the said plaintiffs in the manner provided by law.

Thereupon, the plaintiffs request an extension of time in which to make and serve case-made for appeal herein. And the Court finds that for good cause shown, the time fixed by statute for making and serving case-made for appeal herein should be extended to sixty days from this date.

It is, therefore, considered and ordered by the Court that the plaintiffs herein be, and they are hereby granted sixty days from this date in which to make and serve case-made for appeal herein, and that the defendant be, and it is hereby granted three days thereafter in which to suggest amendments thereto, and that the same may be settled and signed upon three days' notice in writing by either party.

Lucius Babcock, Judge.

[fol. 322] O. K. Suits & Disney, Chas. H. Garnett, Attorneys for Plaintiffs.

O. K. A. L. Hull, Ass't Municipal Counselor, Attorney for Defendant.

[File endorsement omitted.]

[fol. 323] Thereafter a case-made for appeal in said cause was duly prepared, served, settled and signed, filed in the trial court, withdrawn, attached to a petition in error and filed with said petition in error in the Supreme Court of

Oklahoma, all in the time and manner provided by law, the said petition in error being as follows, to wit:

[fol. 324] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23,822

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Plaintiffs in Error,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error

PETITION IN ERROR—Filed July 6, 1932

The Plaintiffs in Error, George Noble and William Noble, complain of the Defendant in Error, the City of Oklahoma City, a municipal corporation, that it recovered a judgment in the District Court of Oklahoma County, in the State of Oklahoma, against the plaintiffs in error above named in a cause pending in said court wherein the said plaintiffs in error were plaintiffs, and the said defendant in error was defendant, and being cause No. 66,314, in said court, at the January, 1932, Term of said court, on the 9th day of January, 1932, and for that the said court on the 21st day of January, 1932, and at the same January, 1932, Term, denied and overruled the motion of the said plaintiffs in error to vacate and set aside said judgment theretofore recovered [fol. 325] by the said defendant in error in said action and to grant the said plaintiffs in error a new trial in said action.

To all of which judgment, order and action of said court the plaintiffs in error reserved exceptions, and in all of which there was manifest error on the part of said court.

And upon the overruling of their said motion for new trial as above stated, the plaintiffs in error gave notice in open court of appeal to the Supreme Court of the State of

Oklahoma from the said findings, decision, judgment and orders of the court in the said action, and requested the court to order and direct the clerk to enter their said notice of appeal upon the journal and trial docket of the court, and thereupon the court did so order.

And now the original case-made of the proceedings of said court in said cause, duly served, signed, certified, attested and filed in said court in said cause, is hereto attached, marked Exhibit A, and made a part of this petition in error.

The said plaintiffs in error aver that there was and is manifest error in the proceedings had by said court in said cause and in the said judgment and orders made and entered therein in this, to wit:

1. That the order and judgment of the said court denying and overruling the said motion of plaintiffs in error for new trial was and is erroneous and contrary to law.

[fol. 326] 2. That the findings, decision and judgment of the court in said cause was and is erroneous because not supported by the evidence.

3. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the evidence.

4. That the findings, decision and judgment of the court in said cause was and is erroneous because it is contrary to the law.

5. That the said court erred in not rendering judgment upon the trial of the cause for the plaintiffs in error as prayed for by them.

6. That the said court erred in that its said decision and judgment are not supported by, but are contrary to, its findings of fact.

7. That the said court erred in admitting incompetent, irrelevant and immaterial evidence upon the trial on behalf of the defendant in error, over the objection of the plaintiffs in error.

8. That the court erred in excluding competent relevant and material evidence offered on behalf of the plaintiffs in error upon objection by the defendant in error.

Wherefore, the plaintiffs in error pray that the said order and judgment of the court made and rendered on the

21st day of January, 1932, over-ruling and denying their said motion to vacate and set aside the said judgment rendered therein on the 9th day of January, 1932, and to grant them a new trial in said action, be reversed, set aside and [fol. 327] held for naught, and that the said judgment rendered on the 9th day of January, 1932, against the said plaintiffs in error also be vacated, reversed, set aside and held for naught, and that the said court be ordered, directed and commanded to enter judgment in said cause for the plaintiffs in error for the relief prayed for in their petition in said cause, or to grant the plaintiffs in error a new trial upon the issues joined in said cause.

Libbey & Sherwin, Suits & Disney, Fred Ptak, and
Chas H. Garnett, Attorneys for Plaintiffs in Error.

[fol. 328] At this stage of the record and proceedings in the case of Higgins et al. vs. City of Oklahoma City, No. 23,822 in the Supreme Court of Oklahoma, it was consolidated with the case of Noble et al. vs. City of Oklahoma City, No. 23,821, in said Court, and the further record and proceedings in it is a consolidated record and proceedings in the two cases. This consolidated record and proceedings follows here.

[fol. 329] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23,821

GEORGE NOBLE et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

and

No. 23,822

ROBERT W. HIGGINS et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

MOTION FOR CONSOLIDATION OF CASES—Filed March 2, 1933

Come now the plaintiffs in error in each of the above entitled cases and represent and show unto the court that

all of the principal questions and issues of fact and law in each of the above cases are the same; that while said cases were tried separately in the court below, substantially all of the record in case No. 23,821 was by stipulation introduced in evidence and made a part of the record in case No. 23,822; that the only substantial difference in the record in the two cases is in the manner in which the plaintiffs in error in the respective cases, who were also plaintiffs below, derived their claim of title to the real estate involved; that a decision in one case will almost certainly be decisive of the other; and that the briefs and argument will of necessity be the same or substantially the same in both cases.

[fol. 330] Therefore, for the reasons and upon the grounds above set forth, the plaintiffs in error in each of said cases respectfully move and ask the court to make and enter its order herein consolidating said cases for briefing, argument and decision, and authorizing the filing of a single brief by the plaintiffs in error in both cases under the title of the two cases as consolidated.

Henry L. Goddard, Suits & Disney, Fred Ptak, and Chas. H. Garnett, Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT OF OKLAHOMA

ORDER GRANTING MOTION TO CONSOLIDATE—March 7, 1933

23,821—George Noble et el. v. City of Oklahoma City;
23,822—Robert W. Higgins et al. v. City of Oklahoma City;

Motion to consolidate the foregoing causes, sustained.

Fletcher Riley, Chief Justice.

[fol. 331] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 23821

GEORGE NOBLE et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

Consolidated

No. 23822

ROBERT W. HIGGINS et al., Plaintiffs in Error,

vs.

CITY OF OKLAHOMA CITY, Defendant in Error

OPINION—Filed Feb. 19, 1935

(Syllabus)

1. Public Lands—Railroads—Congressional Grant to Choctaw Coal & Railway Company of Land for Right of Way and Depot Grounds—Nature of Estate Granted.

Under Act of Congress of February 18, 1888 (25 Stat. 35, as amended by Act of February 13, 1889, 25 Stat. 688), Congress granted to the Choctaw Coal & Railway Company a franchise to construct and operate a railroad in the then Indian Territory, through certain Indian lands, and through the public lands of the United States therein, and granted to said company an estate to a strip of land of the designated width contained in said act, vested in praesenti in the nature of a limited fee, to be used for the purpose of a right of way and depot grounds only, with an implied condition of reverter as to the portion of said right of way traversing public lands, to the United States, upon abandonment of such use.

[fol. 332] 2. Same—Estate Granted Held Superior to Rights of Subsequent Claimants to Public Land.

The estate so granted was superior to the rights of any person acquiring rights in said public lands subsequent to

the passage of said act, and all such persons took notice of such rights of said company, and any rights granted by the United States to such subsequent claimants were subordinate to the prior and superior rights of said company, and of the rights of the United States.

3. Same—Heirs of Original Settlers not Entitled to question Authority of United States to Grant Estate in Lands Upon Claim of Defect of Title in United States.

Under the facts existing in this case, plaintiffs cannot assert want of authority in the United States to make a valid grant of a present vested estate in said lands upon a claim of defect of title in the United States.

4. Same—Land Appropriated to Any Purpose Considered as Severed From Mass of Public Land.

Whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, will be construed to embrace it, or to operate upon it, although no other reservation is made of it.

5. Same—Right of Reverter Reserved to United States in Grant to Railroad not Conveyed to Patentee of Portion of Lands Under Homestead and Pre-emption Laws.

A patent issued under the homestead and pre-emption laws of the United States covering a portion of the lands granted for right-of-way purposes mentioned in syllabus 1. does not convey the right of reverter reserved to the United States.

6. Same—Estate Vested as of Date of Congressional Act Upon Actual Construction of Railroad.

Under the provisions of the above act, the actual construction of the railroad constituted the definite location of the lands to which the estate granted by the act attached, and upon such construction, said estate related back and vested as of the date of said act.

7. Same—United States not Estopped From Asserting Paramount Rights in Public Lands.

Private persons cannot, by act or contract, estop the United States from asserting its paramount rights, and exercising its dominion, over public lands or rights retained therein.

[fol. 333] 8. Same—Lands Abandoned as Right of Way Granted by Act of Congress to Oklahoma City.

Act of Congress of March 8, 1922 (42 Stat. 414) granted to the city of Oklahoma City the land abandoned as a right of way involved herein, subject to the conditions and uses set forth in said act.

Appeal from District Court, Oklahoma County: Lucius Babcock, Judge.

Actions by George Noble et al. and by Robert W. Higgins et al, against Oklahoma City. Judgement for defendant, and plaintiffs appeal. Causes consolidated. Affirmed.

Joe T. Rogers, Libby & Sherwin, Suits & Disney, Henry L. Goddard, Chas. H. Garnett, and Fred Ptak, for plaintiffs in error.

Harlan T. Deupree, Municipal Counselor, and Stokes, Jarman & Brown, for defendant in error.

OSBORN, V. C. J.:

George Noble and William Noble, heirs of Naomi Noble, deceased, brought an action in the district court of Oklahoma county against the city of Oklahoma City in ejectment and to quiet title to certain real property. A similar action was filed by Robert W. Higgins, Jr., and others, as heirs of Robert W. Higgins, deceased. The issues of law and fact in the two cases are very similar, if not identical. Such differences as exist will be hereinafter pointed out. The trial court rendered judgment in favor of the defendant in both cases, and plaintiffs appeal. The causes were consolidated in this court. The parties will be referred to as they appeared in the trial court.

[fol. 334] The property involved herein is located between First and Second streets in Oklahoma City adjacent to the principal business section of the city. For nearly 40 years the property has been used and occupied as a right of way by the Chicago, Rock Island & Pacific Railway Company and its predecessors. On December 4, 1930, the property

was abandoned by the railway company, whereupon this controversy arose.

The land upon which the city of Oklahoma City is now located was opened for settlement by proclamation of the President, pursuant to authority of Congress, on April 22, 1889. In 1890 the Oklahoma Townsite Act was passed by Congress, and thereafter trustees of the townsite of Oklahoma City were approved and the S. E. quarter of section 33, twp. 12 N., R. 3 W., was patented to said trustees for the use and benefit of the occupants of the townsite. Thereafter, the trustees executed a deed to lot 6, in block 36, in Oklahoma City to Naomi Noble. The plaintiffs, George Noble and William Noble, are the sole heirs of Naomi Noble, now deceased.

Robert W. Higgins, Jr., and the other plaintiffs are the heirs of R. W. Higgins, deceased, who received a homestead patent direct from the government as a settler on the S. W. quarter of section 33, twp. 12 N., R. 3 W.

On February 18, 1888, Congress granted certain rights to the Choctaw Coal & Railway Company (25 Stats. 35). The pertinent provisions giving rise to this controversy are as follows:

[fol. 335] "An act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Choctaw Coal and Railway Company, a corporation, created under and by virtue of the laws of the state of Minnesota, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on Red river (the southern boundary line, at the bluff known as Rocky Cliff in the Indian Territory, and running thence by the most feasible and practicable route through the said Indian Territory to a point on the east boundary line, immediately contiguous to the west boundary line of Polk or Sevier counties in the state of Arkansas; also, a branch line of railway to be constructed from the most suitable point on said line for obtaining a feasible and practicable route in a northwesterly direction to the leased coal veins of said Choctaw

Coal and Railway Company in Tobucksey county, Choctaw Nation; with the right to construct, use, and maintain such tracks, turnouts, branches, and sidings and extensions as said company may deem it in their interest to construct along and upon the right of way and depot grounds herein provided for.

"Sec. 2. The said corporation is authorized to take and use for all purposes of railway, and for no other purposes, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said [fol. 336] right of way, or as much thereof as may be included in said cut or fill: Provided, That no more than said addition of land shall be taken for any one station: Provided, further, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken.

"Sec. 3. That before said railway shall be constructed through any lands held by individual occupants according to the laws, customs, and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant such compensation shall be determined by the appraisement of three disinterested referees, to be appointed. * * *

"Sec. 10. That the said Choctaw Coal and Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking

towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant of land, or its occupancy, than is hereinabove provided: Provided, That any violation of the conditions mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act."

On February 13, 1889, the Act was amended (25 Stats. 668) authorizing the construction of a road from Tobucksey county (near Hartshorne, Pittsburg County) to an intersection with the Atchison, T. & S. F. Railway at the most convenient point between Halifax Station and Ear creek [fol. 337] (near the present town of Goodwell).

Thereafter certain other acts were passed extending the time for the construction of the railroad, which are immaterial to the present controversy.

Pursuant to the above acts of Congress, the Choctaw Coal & Railway Company surveyed and located its line, the location crossing the real estate involved herein.

In March, 1905, pursuant to permission of Congress, the Chicago, Rock Island & Pacific Railway Company became the lessee and assignee of the rights of the Choctaw Coal & Railway Company for a period of 999 years, which company operated the line of railway until December 4, 1930, at which time, by permission, the line of railway on the property herein involved was abandoned and quitclaim deeds were executed by the railway company to the city. On December 5, 1930, an action was instituted in the United States District Court entitled "City of Oklahoma City v. Chicago, Rock Island & Pacific Railway Company and Choctaw, Oklahoma & Gulf Railway Company," by which it was adjudged and decreed that on December 4, 1930, the railway company had abandoned the right of way and property involved herein and by virtue of an Act of Congress of March 8, 1922 (42 Stat. 414), all the right, title, and interest in and to said property became vested in the defendant city. The plaintiffs were not parties thereto.

Evidence was introduced on behalf of plaintiffs, George Noble and William Noble, showing that on March 28, 1891, Naomi and George Noble executed to the Choctaw Coal & Railway Company a deed to 40 feet off of the north end of

[fol. 338] lot 6 in block 36, of the city of Oklahoma City, which contained the following reversionary clause:

"'Being intended for the use and occupation of said party (grantee), its successors and assigns, as and for its right of way for the constructing, operation, and maintenance of its railroad and business at or upon the land hereby released and quitclaimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns.''

The property conveyed by the deed is the property involved herein.

On behalf of the Higgins heirs it is shown that on March 24, 1898, a right-of-way deed was executed by R. W. Higgins and wife to the Choctaw, Oklahoma & Gulf Railway Company conveying to said company the property involved herein, which is now claimed by the Higgins heirs, the habendum clause containing the following recital:

"To have and to hold the same by the said Choctaw, Oklahoma & Gulf Railroad Company, together, with all and singular the rights, privileges, and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal & Railway Company a right of way through the Indian Territory, approved February 18, 1888, and subsequent acts of Congress amending and extending said act together with all the rights and privileges granted unto said Choctaw, Oklahoma & Gulf Railroad Company by an Act of Congress approved August 24, 1894, and the Act of Congress approved April 24, 1896, and unto its successors, and assigns forever.''

It is further shown that some condemnation proceedings were had in which certain other property was condemned [fol. 339] by the railroad company and the damages awarded and paid under the condemnation proceedings. The necessity for the execution of these deeds and the condemnation proceedings arose in the following manner. When the property involved herein was opened for public settlement on April 22, 1889, the right of way of the railroad company was staked off through the town site and an

effort was made to prevent the settlers from staking claims on the right-of-way property. Disputes between the railroad company and the settlers arose over the right-of-way property and the work of construction was delayed. As originally staked off, the right of way took a diagonal course across the town site. Certain negotiations between the company officials and a citizens committee resulted in a relocation of the right of way running directly through the town site parallel with the lots. The right of way first staked off was abandoned and a new right of way located in the alley between first and second streets. It was sought to float a bond issue to secure funds to purchase the right of way for the company, but the project failed when the President vetoed an act of Congress approving the issuance of said bonds. Thereafter other arrangements were made and the necessary funds were secured by the committee of citizens and 40 feet off the south end of the north lots and 40 feet off the north end of the south lots were secured by agreement with the owners either by deed or condemnation, and upon this right of way the railroad lines were constructed.

At the very threshold we are confronted with the nature of the right, privilege, or estate granted by the above-[fol. 340] quoted act to the Choctaw Coal & Railway Company, it being contended by defendant that a right of way in the nature of a base or determinable fee, with possibility of reverter in case of nonuser, was granted by said act. But plaintiffs contend that only a franchise was granted to said railway company to acquire a right of way over said lands, and that Congress was without authority to grant more than a mere right to exercise the sovereign power of eminent domain for the reason that at the time of the passage of said act said lands belonged to the Creek Tribe of Indians, or at least that the Creek Tribe of Indians had an interest therein, which Congress was without authority to impair.

We are cited by plaintiffs to a number of treaties between the United States and the Creek Nation dating from January 24, 1826, which by their terms propose to secure and guarantee to the Creek Nation a large domain of land, including the lands in controversy herein, and to cause a patent, should the nation so require, to be executed to said Creek Nation subject to certain conditions. On June 14,

1866, a treaty was entered into between the United States and the Creek Nation with which we are immediately concerned. (14 Stat. 785, 1 Kapler, 931.) By the terms thereof the Creek Nation, for a certain consideration and for certain specified purposes, ceded and conveyed to the United States the west half of said domain (in which the lands involved herein were included) "to be sold to and used as homes for such other civilized Indians as the United States [fol. 341] might choose to settle thereon". The United States did not have occasion to use said lands for such purposes, and on January 19, 1889, a further treaty was entered into with the Creek Nation whereby said nation ceded and granted to the United States "without reservation or condition full and complete title to the entire western half of the domain * * * and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except. * * *" Said treaty was ratified by the council of the Creek Nation on January 31, 1889, and by the Congress on March 1, 1889. Although the Railway Act above mentioned was passed on February 18, 1888, in any event the United States became invested with full title free from restrictions by the approval of the treaty on March 1, 1889. By Act of Congress of March 2, 1889 (25 Stats. 1004), Congress authorized the opening of said lands for settlement as a part of the public lands, and thereafter by proclamation of the President, dated March 23, 1889, pursuant to Congressional Act, April 22, 1889, at 12:00 o'clock noon was appointed as the time when settlers might exercise certain rights granted under the provisions of the Act of March 2, 1889, to settle upon said lands and eventually to obtain title thereto. The Creek Nation did not complain of the act of Congress in this respect, and by the provisions of the treaty above mentioned said nation waived all of its rights in and to said lands and ceded and granted such rights to the United States. In this connection it is worthy of note that, by the Act of March 2, 1889, Congress [fol. 342] made specific provision that the release and extinguishment of the Indian rights "shall not inure to the benefit of or cause to vest in any railroad company any right, title or interest whatever in or to any of said land * * * except rights of way and depot grounds. * * *" Recognition was thereby given to any rights granted under the Act of February 18, 1888. On February 13, 1889, Con-

gress passed an amendatory act, granting additional rights to said railway company, thereby recognizing the force and effect of their previous enactment. By the Organic Act (26 Stat. 81, approved May 2, 1890) it was again provided, "No part of the land embraced within the territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations." Sec. 18.) On February 21, 1891, Congress passed an act extending the time for construction of the road (26 Stats. 765), and on January 22, 1894, a similar act was passed granting a further extension. (28 Stats. 27.)

Plaintiffs rely upon the case of Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 34 L. Ed. 295, 10 Sup. Ct. 965. Said case is clearly distinguishable from the case at bar.

With all of the congressional recognition of the rights of the railroad company, both prior and subsequent to the attachment of any rights of plaintiffs, it is clear that plaintiffs, after the lapse of 40 years, cannot claim a want of title in the United States to defeat whatever rights were granted, recognized, and acquiesced in by the Congress, the [fol. 343] public, and the predecessors in title of the plaintiffs.

We pass now to a consideration of the nature of the estate granted the railway company by the Act of 1888, supra. But before entering upon said discussion we deem it proper to allude to the surrounding facts and circumstances and the fixed policy of the government relating to the construction of railroads in the vast unoccupied public domain. It had long been the fixed policy of Congress, in recognition of the inestimable aid of an adequate system of transportation to the interior development of the country, to give assistance to the building of railroads through undeveloped territory, not only by granting rights of way without compensation to the government therefor, but also by granting large tracts of public lands not necessary for actual use in the construction, maintenance, and operation of the railroad, which lands could be sold by said railroads to pioneer settlers. That Congress had the undisputed right to dispose of the public lands as it saw fit and proper is well recognized. Ruddy v. Rossi, 248 U. S. 104, 29 S. Ct. 46, 63 L. Ed. 148.

We call attention at this time also to a well-known rule of construction of congressional grants that the acts of Congress by which said grants are made constitute legislative enactments as well as conveyances of the rights granted, and that such effect must be given thereto as will carry out the legislative intent. In the case of United States v. Southern Pacific Railroad Company, 146 U. S. 570, 36 L. Ed. 1091, 13 S. Ct. 152, it is said:

[fol. 344] "Illy as it may accord with the common-law notion of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and, therefore, that in the eye of the law it is now as though there never was a period of time during which any titles to these lands was in the Southern Pacific."

In the case of Missouri, K. & T. R. R. Co. v. Kansas Pac. R. R. Co., 97 U. S. 491, 497, 24 L. Ed. 1095, 1097, it is said:

"It is always to be borne in mind, in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of common law must yield in this, as in all other cases, to the legislative will."

Plaintiffs contend that the act of 1888 did not create a grant in præsenti of a right of way, but merely granted a franchise to the railway company to acquire a right of way by purchase or by condemnation, and that no right or title vested until said right of way had been taken and paid for as provided by the act. Turning our attention to the act itself, we note that by section 1 *of* the railway company is

"invested and empowered with the right of locating, con- [fol. 345] structing, * * * a railway" between fixed termini "by the most feasible and practicable route * * * with the right to construct * * * such tracks * * * upon the right of way and depot grounds herein provided for." By section 2 said corporation "is authorized to take and use for all purposes of railway, and for no other purpose, a right of way 100 feet in width through said Indian Territory. * * *"

The question presented has had much judicial consideration in strikingly similar cases.

In the case of St. Joseph, Denver City R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578, the court was concerned with a controversy arising over a grant to the railroad company of a right of way in the state of Kansas. The act was dated July 23, 1866 (14 Stat. 210). The line of road was not definitely located until October, 1871, and Baldwin acquired his rights in October, 1869. He contended that the company had no vested right to the right of way until the line was located, and the trial court and the state Supreme Court adopted his view. The Supreme Court of the United States, however, took the opposite view, holding as follows:

"The Act of Congress of July 23, 1866, ch. 212, granting to the state of Kansas for the benefit of the St. Joseph & Denver City Railroad Company, the right of way over public lands, is a present absolute grant.

"All persons acquiring any portion of the public lands after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road."

The territorial Supreme Court, at its January, 1896, term, decided the case of Churchill v. Choctaw Railway Company, [fol. 346] 4 Okla. 462, 46 P. 503. In that case the company claimed a right of way over the property of Churchill by virtue of the grant contained in the Act of 1888, supra. Churchill had made a homestead entry on the land on April 30, 1889. On July 13, 1889, the company filed its map showing the route over Churchill's property. It was sought by injunction to prevent the railway company from entering upon the land without paying compensation. The court followed the Baldwin Case and decided the issues in favor of the railway company. Therein it is said:

"An act of Congress investing and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using and maintaining a railway through and over public land and providing that said company is authorized to take and use for all purposes of a railroad right of way over said public land is a present absolute grant.

"A homestead settlement subsequent to such an act is subject to the rights of the railway company, although the line of the road was not definitely located until after the entry, and the settler cannot recover for damages necessarily occasioned by the building of the railway under said act."

In Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267, 23 S. Ct. 671, 47 L. Ed. 1044, the court said:

"Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U. S. 171, 19 S. Ct. 128, 43 L. Ed. 407; Railroad Co. v. Baldwin, supra), it must be held that the fee passed by the grant made in section 2 of the Act of July 2, 1864."

The court proceeds to explain the kind of title passed by said grant, and stated that the grant was for a specified pur- [fol. 347] pose, and could not be voluntarily alienated. The court then said:

"The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purpose of the railroad, just as though the land had been conveyed to have and to hold the same so long as it was used for the railroad right of way. In effect, the grant was of a limited fee made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In the case of New Mexico v. United States Trust Co., 172 U. S. 171, 19 S. Ct. 128, 43 L. Ed. 407, the court was dealing with a grant similar to that involved herein. In answering the contention that the grant constituted an easement rather than a fee, it was said:

"But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one

having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property."

In the case of Rio Grande Railway Company v. Stringham, 239 U. S. 44, 36 S. Ct. 5, 60 L. Ed. 136, the court said that the right of way granted by a certain act of Congress is neither a mere easement nor a fee simple absolute, but a limited fee made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purpose for which it is granted, and carries with it the incidents and remedies usually attending the fee, citing New Mexico v. United States Trust Co., 172 U. S. 171, 183; Northern Pac. Ry. Co. v. Townsend, supra; United States v. Michigan, 190 U. S. 540.

[fol. 348] Plaintiffs rely on the case of Smith v. Townsend, 148 U. S. 460, 13 S. Ct. 634, 37 L. Ed. 533, where in the body of the opinion it is said that under a certain Act of Congress of July 4, 1884 (23 Stat. 73, ch. 179), there was granted to the Atchison, T. & S. F. Ry. Company a mere right of way, and the fee continued in the Indians. So far as the immediate controversy is concerned, it is not necessary to direct attention to the specific terms of the congressional grant, it being sufficient to say the question involved in the case was whether or not an employee of the Atchison, T. & S. F. Ry. Company residing on the right-of-way property up to and on the 22nd day of April was thereby disabled from making a homestead entry on a tract of land subject to entry. The nature of the estate of the railway company in and to the right-of-way property was merely incidental to the question before the court, and the discussion in the opinion relating to such issue is dictum. If it could be said that such statement rises to the dignity of an adjudication, it would be contrary to the overwhelming weight of authority. The rule announced in the Baldwin Case and by the territorial Supreme Court is supported by the following federal and state authorities: Stalker v. Oregon Short Line, 225 U. S. 142, 32 S. Ct. 636, 56 L. Ed. 1027; affirming Oregon Short Line R. Co. v. Stalker, 14 Idaho, 362, 94 P. 56; Choctaw, Oklahoma & Gulf Ry. Co. v. Mackey, 256 U. S. 531, 41 S. Ct. 582, 65 L. Ed. 1076; Union Pac. R. R. Co. v. Laramie, Stock Yards, 231 U. S. 190, 34 S. Ct. 101, 58 L. Ed. 179; Northern Pac. R. R. Co. v. Ely, 197 U. S. 1, 49 L. Ed. 639; Northern Pac. Ry. Co.

v. Hasse, 197 U. S. 9, 25 S. Ct. 305, 49 L. Ed. 642; James-
[fol. 349] town & Northern R. Co. v. Jones, 177 U. S. 125, 20 S. Ct. 568, 44 L. Ed. 698; Noble River L. R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123; Denver & R. G. R. Co. v. Alling, 99 U. S. 463, 25 L. Ed. 438; Missouri, K. & T. Ry. Co. v. U. S., 47 Ct. Cl. 59; Missouri, K. & T. Ry. Co. v. Watson, 24 Kan. 494, 87 P. 687; Bowman v. McGoldrick Lmbr. Co. (Idaho) 219 P. 1063; Northern P. Ry. Co. v. Pyle, 19 Idaho, 3, 1112 P. 678; Regan v. Boyd, 59 Mont. 453, 197 P. 832; Northern P. Ry. Co. v. McDonald, 91 Wash. 113, 157 P. 222.

Plaintiffs argue that the language used in the granting clauses of some of the above acts is substantially different from the language used in the Act of 1888, that the words "take and use" are peculiar to the act involved herein and are indicative of a purpose to grant only the right to acquire a right of way. The court in the case of Churchill v. Choctaw Railway Co., supra, adopted the view contrary to plaintiffs' contention and approved the rule announced in the various cases herein quoted. It plainly appears that there was a legislative intention to make an absolute grant of a right of way. Subsequent legislation on the subject after the land was acquired by the United States in fee simple recognized the existence of a previous grant. We are impelled to conclude that the territorial Supreme Court arrived at a correct conclusion as to the nature of the estate granted by the act under consideration.

Having determined that a grant in praesenti was made by the act under consideration, we are confronted with the relative rights of the railroad company and settlers upon [fol. 350] the public domain prior to the actual location of the railroad on the granted lands. This question has been set at rest, however, by the Supreme Court of the United States in the case of St. Joseph & Denver City Railroad Co. v. Baldwin, supra, wherein the distinction is noted between the grant of a right of way and the grant of lands in aid of construction. Therein it is said:

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location,

very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed, is conclusive that none exists.

"We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

The above case was quoted from and followed by the [fol. 351] Supreme Court of the United States in the later case of Bybee v. Oregon & Cal. Ry. Co. (1891) 139 U. S. 663, 11 S. Ct. 641, 35 L. Ed. 305, and Nadeau v. Union Pac. R. R. Co. (1920) 253 U. S. 442, 40 S. Ct. 570, 64 L. Ed. 1003. See, also, Northern Pac. R. R. Co. v. Ely, 197 U. S. 1, 25 S. Ct. 302, 49 L. Ed. 639; Northern Pac. R. R. Co. v. Hasse, 197 U. S. 9, 25 S. Ct. 305, 49 L. Ed. 642; North Chicago St. Ry. Co. v. Chicago Union Traction Co., 150 Fed. 612; Stuart v. Pacific Ry. Co., 178 Fed. 753, 227 U. S. 342, 33 S. Ct. 338, 57 L. Ed. 535.

It is conceded that upon abandonment by the railroad company its title terminated. We must determine, however, whether or not the reverter inured to the United States or passed by the government patent issued to plaintiff's predecessors. In this connection we direct attention to the recognized rule of construction of the title granted by patents issued by the officials of the government pursuant to congressional authority. No official can transcend the congressional authority pursuant to which such patent is issued, and every such patent must find unmistakable au-

thority from Congress to dispose of the right or estate attempted to be conveyed. This is an important rule of construction, oft pronounced and uniformly recognized. If said interests in the public domain have been withdrawn by congressional act from the operation of subsequent enactments, no act of any official, of whatever rank, is effective to override the congressional limitation.

The rule announced in the early history of our jurisprudence in the ancient case of Wilcox v. Jackson, 13 Pet. 498, wherein the court said:

[fol. 352] "Whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no other reservation were made of it."

In Leavenworth, Lawrence & Galveston Ry. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634, the Supreme Court of the United States had under consideration a grant of lands to the state of Kansas in alternate sections. Prior to said grant certain lands were occupied by the Osage Indians under a treaty previously entered into with the United States. The Governor of the state of Kansas, construing the wording of the grant as broad enough to include alternate sections of land, issued patents thereto regardless of the occupancy by the Osage Indians, whereupon the government instituted suit to cancel said patents as to lands so occupied. In the body of the opinion the court said:

"The main question in R. Co. v. Litchfield, 23 How. 66, 16 L. Ed. 500, was whether a grant to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, extended to lands above the Raccoon fork, or was confined to those below it, the court, in deciding it, says: 'All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and as the right here claimed are derived entirely from the act of Congress, the donation stands upon the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied.'

"This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the meaning and intent expressed in it. It [fol. 353] should be either enlarged by ingenious reasoning or diminished by strained construction. The construction must be reasonable and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting the act, but if they admit of different meanings—the one of extension, and the other of limitation—they must be accepted in a sense most favorable to the grantor. And if a right be asserted against the government, it must be so clearly defined that there can be no question of the purpose of Congress to confer it. In other words, what is not given expressly, or by necessary implication, is withheld. * * *

"Only the public lands owned absolutely by the United States are subject to survey and division into sections, and to these lands this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy. * * *

"And such grants could be treated in no other way, for Congress cannot be suposed to have thereby intended to include lands previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of them was not necessary, because the policy which dictated the grants confined them to lands which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of. * * *

"'A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.' * * *

"Every tract set apart for some special use is preserved to the government to enable it to enforce that use. And there is no difference, in this respect, whether it be appropriated for Indian occupancy, or for other purposes. [fol. 354] There is an equal obligation resting on the government to see that neither class of reservation is diverted from the uses to which it was assigned."

In St. Louis Smelting, etc., Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 745, the court said:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and exercise it; that is to say, in a case where the land belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reesrved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed."

In the case of Burfenning v. Chicago, St. Paul, etc., Ry. Co., 163 U. S. 321. 16 S. Ct. 1018, 41 L. Ed. 175, Mr. Justice Brewer said:

"It has undoubtedly been affirmed over and over again that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony, and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. Johnson v. Towsley, 13 Wall. (U. S.) 72, 20 L. Ed. 485, Steel v. Smelting Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. Ed. 226; Wright v. Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. Ed. 1039; Heath v. Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. Ed. [fol. 355] 1063; McCormick v. Hayes, 159 U. S. 332, 16 S. Ct. 37, 40 L. Ed. 171. But it is also equally true that, when by act of Congress a tract of land has been reversed from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress,

or convey away public lands in disregard or defiance theerof. Wright v. Roseberry, supra; Doolan v. Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. Ed. 844; Davis, Adm'r, v. Widbold, 139 U. S. 507, 529, 11 S. Ct. 628, 35 L. Ed. 238; Knight v. U. S. Land Ass'n, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974."

The doctrine announced in the Wilcox v. Jackson Case, supra, has been widely quoted and followed: Witherspoon v. Duncan, 4 Wall. 210, 218; Chotard v. Pope, 12 Wheat. (U. S.) 586; Carroll v. Stafford, 3 How. (U. S.) 44; Buttz v. Northern Pac. Ry. Co. 119 U. S. 55; Kansas, Pac. Ry. Co. v. Dunnmeyer, 113 U. S. 629; Hastings & Dakota Ry. Co. v. Whitney, 132 U. S. 357; Whitney v. Taylor, 158 U. S. 85, 15 S. Ct. 796, 39 L. Ed. 906; Sioux City & Iowa Falls Land Co. v. Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. Ed. 64; United States v. Southern Pac. Ry. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. Ed. 1091; Northern Pac. R. R. Co. v. Trodick, 221 U. S. 208, 31 S. Ct. 607, 55 L. Ed. 704; Tarpey v. Madsen, 178 U. S. 215, 20 S. Ct. 849, 44 L. Ed. 1042; St. Paul, Minnesota & Manitoba Ry. Co. v. Donahue, 210 U. S. 21, 28 S. Ct. 600. See the following cases from the territorial Supreme Court; Enid & Anadarko Ry. Co. v. Kephart, 19 Okla. 1, 91 P. 1049; McMichael v. Murphy, 12 Okla. [fol. 356] 155, 70 P. 189; Hodges v. Colcord, 12 Okla. 313, 70 P. 383; Holt v. Murphy, 15 Okla. 12, 79 P. 265. See the following decisions from the Land Department; Whitney v. Maxwell 2nd Land Dec. Dep. Int. 98; Schrotberger v. Arnold, 6th Land Dec. Dep. Int. 425; Allen v. Curtiss, 7th Land Dec. Dep. Int. 444; Faulkner v. Miller, 16th Land Dec. Dep. Int. 130.

Much litigation has had the attention of the state courts and the federal courts, including the Supreme Court of the United States, relating to the obtaining of title by individuals to land granted by Congress to railroad companies for right of way from said railroad companies either by voluntary conveyance or by adverse user for such length of time as under the state law title arose by prescription. A great contrariety of conflicting decisions ensued in the various states. Said question was set at rest in 1898 by the Supreme Court of the United States in the case of Northern Pac. R. R. Co. v. Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. Ed. 157, which case was followed by the case of Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267; wherein the court used the following language:

"Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in Northern Pacific R. R. Co. v. Smith, 171 U. S. 261, 275, speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the [fol. 357] general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

"To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

It will thus be seen that the judicial construction given to the various acts granting rights of way to railroad companies recognized a public use and proprietary interest on the part of the government of the United States in the character of title remaining in said land which had been granted for right of way purposes to the various railroads. By many enactments unnecessary to delineate more specifically herein, Congress had assumed to exercise a certain limited control over said lands which had been conveyed or which had not been actually used for right-of-way purposes culminating in the passage of the Act of Congress of April 28, 1904 (33 Stats. 538), of May 25, 1920 (41 Stat. 621), and of March 8, 1922 (42 Stats. 414), which latter act will be hereinbefore referred to.

As heretofore pointed out, the various acts relating to [fol. 358] the opening of the country for settlement and the

proclamation of the President specifically recognize prior grants for rights of way and depot grounds to railroad companies. The judicial and legislative constructions were numerous and well established as to other grants of right of way. By section 2 of the act, supra, it was provided that when any portion of the lands so granted ceased to be used for railway purposes, the same should revert to the nation or tribe of Indians from which same was taken. The United States succeeded to all the rights of the Creek Nation by treaty. We have searched in vain to find express authority granted to any government official authorized to issue patents to convey to the homestead settler this right of reverter to the United States, and under the well-established judicial decisions we are not at liberty to imply such power and authority. We therefore conclude that the right of reverter under the act under consideration in this case inured to the benefit of the United States and not to the patentee of lands under the various homestead and pre-emption acts of Congress.

It is contended by plaintiffs, however, that the railroad company abandoned a portion of its right of way as granted by Congress under the Act of 1888, and substituted in lieu thereof a purchased right of way over lands of plaintiffs' predecessors, and that having accepted right-of-way deeds from plaintiffs' predecessors, the railroad company and its successors in title, the city, are estopped from asserting an adverse title to the title of plaintiffs. In this connection the record discloses that the railroad company made a survey [fol. 359] of its proposed route diagonally through the section of land wherein the lands involved herein are located. A map of said location was filed with the Secretary of the Interior on July 13, 1889, and approved by him. The plaintiffs assert that their rights had their inception in occupancy on April 22, 1889. It is asserted by defendant city in its brief, and not denied by plaintiffs, that all of the lands involved herein granted by the Noble heirs were in fact embraced in the original survey; but it is conceded that as to the Higgins heirs, although the preliminary survey crossed the quarter section of land eventually patented to their ancestor, the identical strip of land involved herein was not embraced within the original survey nor shown on said approved map.

In discussing the question, we turn to the act itself to analyze some of its provisions. By section 3, quoted,

supra, the railroad company is required to make full compensation to "individual occupants according to the laws, customs and usages of any of the Indian Nations or Tribes * * * for all property to be taken or damage done by reason of the construction of such railroad." In case of controversy over said compensation a form of condemnation proceedings is provided by said act. By section 5, said railroad company is required to pay to the Secretary of the Interior for the benefit of the particular nations or tribes through whose lands the railroad may be located the sum of $50 for each mile of railroad and a further sum of $15 per mile per annum, required as rental to be paid in like manner to said tribe during the continuance of the Indian [fol. 360] title. Compensation for any others than those designated is not provided for, and such compensation is therefore withheld. Section 6 of the act provides:

"That said company shall cause maps showing the route of its located lines through said territory to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company; Provided, that when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void; and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any such section shall be begun."

The purpose of filing said map and the right of the railroad company under the act of 1888 to construct its line between the fixed termini along the most feasible and practicable route had judicial consideration in the early case of United States ex rel. Search et al, v. Choctaw, Oklahoma & Gulf Ry. Co., 3 Okla. 404, 41 P. 729. Mr. Justice McAtee, on behalf of the court, prepared a very lengthy and exhaustive opinion wherein the authority of the Secretary of the Interior in approving the map and its affects upon the rights of the railroad company were discussed at length. The facts giving rise to said discussion were that the railroad company filed a map showing the location of its line of

railroad near the town of Tecumseh, which map was duly approved. Thereafter, the company determined to change [fol. 361] said route, locating same through what is now the site of the city of Shawnee. Pursuant to said change the company filed another map with the Secretary of the Interior showing said change, which map the Secretary of the Interior declined to approve. Relating thereto, the court said:

"No conditions precedent to the right to build the road are to be found in the Act of 1888 and those which follow it, except such as provided for the protection of the Indians, or granted authority to the railroad company. The railroad company, then, accepted the grant upon the conditions therein provided, and no other. It had the right to rely upon the grant of powers made to it, upon conditions only that it should fulfill and comply with the precedent conditions upon which the powers were granted.

"The company, having accepted the condition upon which it was provided that it might build its line in the Indian Territory, and having entered upon its location and construction, had a right to locate and construct its line without the imposition of further conditions. Congress itself would have no right to impose them, unless it should undertake to do so under the power, reserved in the act itself, 'To amend, add to, alter, or repeal this act,' a reservation of authority which does not exist in the Secretary of the Interior. * * *

"We, therefore, hold that the Choctaw, Oklahoma & Gulf Railway Company was authorized by the Acts of 1888 and 1894, to locate its own lines through the section of country wherein 'section 4' is built, and has located this line by the most feasible and practicable route, and inasmuch as the right of location and construction were dependent only upon the performance of the conditions set forth in the act, and that these conditions were for the protection of the Indian Tribes and nations or of Indian occupants under the laws, cutsoms and usages of the Indian tribe or nation, and that the defendant company has fully complied with the conditions, that the defendant company [fol. 362] is invested and empowered with the right to locate and construct its line, and to the approval of the Secretary of the Interior therefor, and that, the Indian interests having been extinguished, the land became subject to the laws of the territory of Oklahoma, without the intervention of the

limitations of the Indian Intercourse Act. And that the defendant company, having complied with the provisions of the laws of this territory authorizing the laying out and construction of railways, is entitled to locate and construct its lines thereunder. * * *"

We are convinced that the viewpoint of the territorial Supreme Court as to the requirements of the filing of said map is correct. Clearly it was not the intention of Congress that the making of a survey, or the filing of maps thereof, through the vast unsettled public domain should operate as an irrevocable or final location of the route of said railroad. A definite location may be fixed by construction of the road. Jamestown & Northern Ry. Co. v. Jones, 177 U. S. 125, 44 L. Ed. 698; Stuart v. Union Pac. R. R. Co., 227 U. S. 342, 33 S. Ct. 338, 57 L. Ed. 535. The duty was enjoined on the company to construct its road along the "most feasible and practicable route". Serious difficulties were confronted on every hand; homeseeking immigrants ignored the staked and guarded right of way claimed in a diagonal direction through the land sought to be settled by them as a town site; bitter controversy ensued and in the newly organized tribunals the assertion of the rights of the company by litigation, by delay alone, would cause the forfeiture of the franchise conferred upon it and of the grant made to it by Congress to carry out its farsighted policy of furnishing a means of transporta-[fol. 363] tion to those who had cast their fortunes in the newly opened and unsettled domain. At the time of the passage of the Act of 1888, and prior to April 22, 1889, every person, except those specifically recognized by the government, no matter how long his occupation or how large his improvements, was a trespasser and could maintain no right of possesssion against the United States or its grantees. And the company having been granted an estate in præsenti, of which all persons were bound to take notice, these numerous settlers, by adverse claims of occupancy, could not hinder, frustrate, and effectively thwart the declared policy of the government in granting a free right of way to a company to whom it had delegated the privilege, and which had accepted the duty, of constructing and operating a railroad through the public domain.

The right of the railroad company to said right of way was not predicated upon a condition precedent that a map

should be filed showing the exact location of said railroad, nor was there a condition subsequent attached to said grant that in the event a map not filed and approved, the grant of right of way should become forfeited or void. The attendant benefit was specifically stated in the act that "after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said map shall be valid as against the said company," referring, of course, to the "individual occupants according to the laws, customs, and usages of any of the Indian nations or tribes." Unless the company commenced [fol. 364] grading said located land within six months after the filing of the map, the act provides that "such location shall be void." and provision is made that the Secretary of the Interior shall approve the said location in sections of 25 miles before construction shall begin on such sections.

We must conclude that without the filing of a map prior to the actual construction of the railroad the company had a right to change its location to conform to "the most feasible and practicable route," and that by the filing of the map before construction of the railroad the company was not irrevocably precluded from selecting another route which it determined to be more feasible and practicable under the conditions confronting it. Stuart v. Union Pacific R. R. Co., 227 U. S. 342, 33 S. Ct. 338, 57 L. Ed. 535; Nielsen v. Northern Pac. R. R. Co. (C. C. A.), 184 Fed. 601; Nadeau v. Union Pac. R. R. Co., supra.

On April 24, 1896, a congressional act (29 Stat. 98) was passed relating to the railroad line with which we are dealing, which in part provides:

"Section 3. That the line of railroad which has been heretofore constructed shall be regarded and treated as a full compliance by said company with the requirements of the act applicable to it, by which it was required as a condition of further construction thereafter to complete its main line prior to February 18, 1896, and said company may exercise from time to time the rights, powers, and franchise heretofore or by this act conferred as to further extensions of or branches from its existing line."

The above constitutes a congressional approval of the location of the road on the route which was finally selected. [fol. 365] We therefore conclude that the right of way was

definitely located by construction of the railroad line, and the grant thereof related back to the date of the act, and since the rights of plaintiffs' predecessors in title were acquired with notice of the rights of the railroad company previously granted, subject to the definite location of the right of way, they had no title to the land itself to convey at the time the right-of-way deeds were executed by them to the company. By the deeds they simply waived their claim of possession.

Plaintiffs contend, however, that by the acceptance of the deeds hereinabove mentioned, the railroad company, and its successors in interest, the city, are estopped from denying the title of plaintiffs' predecessors to the tracts of land in controversy. This claim of plaintiffs overlooks, however, that the title of the railroad company was extinguished by abandonment and that the right of reverter inured to the benefit of the United States and that by Act of Congress dated March 8, 1922 (42 Stats. 414), the United States invested in the city the title to said property by specific grant for certain purposes as set forth in said act. There can be no estoppel as against the United States arising by reason of the individual acts or contracts of individuals. The title of the city is deraigned from the government and not from the railroad company, nor from the predecessors of plaintiffs.

The reversion clause in the Noble deed purported to contract with reference to a right retained by the United States [fol. 366] government, and was therefore wholly ineffective. We point out also that in the Higgins deed the deed expressly recognized the rights of the company under the Act of 1888, and subsequent acts, which right we have determined hereinabove to be superior to the claims of the Higgins heirs. We conclude that upon abandonment by the railroad company, and the judicial determination thereof, as hereinabove set forth, the city became invested with the title to the tracts of land in controversy subject to the provisions of Congress by the Act of March 8, 1922 (42 Stats. 414).

McNeill, C.J., and Riley, Bayless, Busby, Welch, Corn, and Gibson, JJ., concur. Phelps, J., not participating.

[fols. 367-377] Petition for rehearing, covering 10 pages, filed March 5, 1935, omitted from this print. It was denied, and nothing more, by order of May 7, 1935.

[fol. 378] IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—May 7, 1935

23,821—Geo. Noble et al. v. City of Oklahoma City. Petition for rehearing denied. Phelps, J., not participating.

23,822—Robert W. Higgins v. City of Oklahoma City. Petition for rehearing denied. Phelps, J., not participating.

Edwin R. McNeill, Chief Justice.

[File endorsement omitted]

[fol. 379] IN SUPREME COURT OF OKLAHOMA

ORDER STAYING MANDATE—Filed May 9, 1935

On this 9th day of May, 1935, upon the application of the plaintiffs in error in the above entitled cause, it is ordered that the issuance of the mandate of this court to the trial court in said cause be, and it is hereby, stayed pending the application of said plaintiffs in error to the Supreme Court of the United States for a writ of certiorari to this court in said cause, and upon the receipt of notice by the clerk of this court from the clerk of the Supreme Court of the United States that said application for writ of certiorari has been duly filed in the Supreme Court of the United States before August 7, 1935, the issuance of said mandate shall be further stayed until the final decision and judgment of the Supreme Court of the United States in such certiorari proceedings.

Edwin R. McNeill, Chief Justice.

[fols. 380 & 381] [Title omitted]

ORDER STAYING MANDATE—Filed May 9, 1935

On this 9th day of May, 1935, upon the application of the plaintiffs in error in the above entitled cause, it is ordered that the issuance of the mandate of this court to the trial court in said cause be, and it is hereby, stayed pending the application of said plaintiffs in error to the Supreme Court of the United States for a writ of certiorari to this court in said cause, and upon the receipt of notice by the clerk of this court from the clerk of the Supreme Court of the United States that said application for writ of certiorari has been duly filed in the Supreme Court of the United States before August 7, 1935, the issuance of

said mandate shall be further stayed until the final decision and judgment of the Supreme Court of the United States in such certiorari proceedings.

Edwin R. McNeill, Chief Justice.

[fol. 382] In the Supreme Court of the United States,
October Term, 1935

No. —

George Noble and William Noble, Petitioners,

vs.

The City of Oklahoma City, a Municipal Corporation, Respondent

Consolidated

No. —

Robert W. Higgins, Jr., John T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Petitioners,

vs.

The City of Oklahoma City, a Municipal Corporation, Respondent

Stipulation as to Printing Record

It is hereby stipulated and agreed between counsel for petitioners and counsel for respondent that the above entitled cases, having been consolidated for hearing and decided in one opinion by the Supreme Court of the State of Oklahoma below, may be consolidated for the printing of the record and briefing and submission in the Supreme Court of the United States.

[fol. 383] It is further stipulated by counsel that the following parts of the record in each case, the record not having been printed heretofore in either case, but having been certified and transmitted in typewritten form in each case by the clerk of the Supreme Court of the State of Oklahoma to the Clerk of this Court, are hereby designated as the parts of the record in each case, and the only parts thereof, necessary to

be printed for the presentation of said cases in this Court, towit:

The Petition;
The Answer and Crosspetition;
The Reply and Answer;
The Statement of the Evidence;
The Motion for New Trial;
The Decision and Judgment of the Trial Court, with Order Over-ruling Motion for New Trial, Notice of Appeal, etc.,
The Petition in Error in the Supreme Court of Oklahoma;
The Motion to Consolidate the Causes and Order Consolidating them;
The Opinion and Decision of the Supreme Court of Oklahoma;
The Petition of Plaintiffs in Error for Rehearing;
The Order of the Supreme Court of Oklahoma Denying Petition for Rehearing; and
The Order of the Supreme Court of Oklahoma Staying the Mandate.

It is further stipulated by counsel that a copy of transcript of the parts of the record above designated in each case has been prepared by them and is attached as Exhibit A to this [fol. 384] stipulation, and that it contains and comprises all the parts of the record in each case necessary to be printed, and that the printing thereof shall be a full compliance with this stipulation.

It is further stipulated by counsel that the foregoing parts of the record in each case may be printed together as a consolidated record for both cases and shall be printed without duplication; and the Clerk of the Supreme Court of the United States is authorized and requested to arrange and print said designated parts of the record in each case as a consolidated record so as to avoid duplication in printing, making such omissions as may be necessary for that purpose, and also to omit any matter therein such as the repetition of the title of the court and case, signatures, etc., which he may deem unessential.

Warren E. Libby, Henry L. Goddard, Suits & Disney, Fred Ptak and Charles H. Garnett, Attorneys for Petitioners. Harlan Deupree, Municipal Counselor; J. H. Jarman, W. H. Brown, Attorneys for Respondent.

[fol. 385] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 335

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 386] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 336

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.